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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 118

PRINCESS LIDA OF THURN AND TAXIS, FORMERLY LIDA ELEANOR PURCELL FITZGERALD, AND JOHN PURCELL FITZGERALD, PETITIONERS,

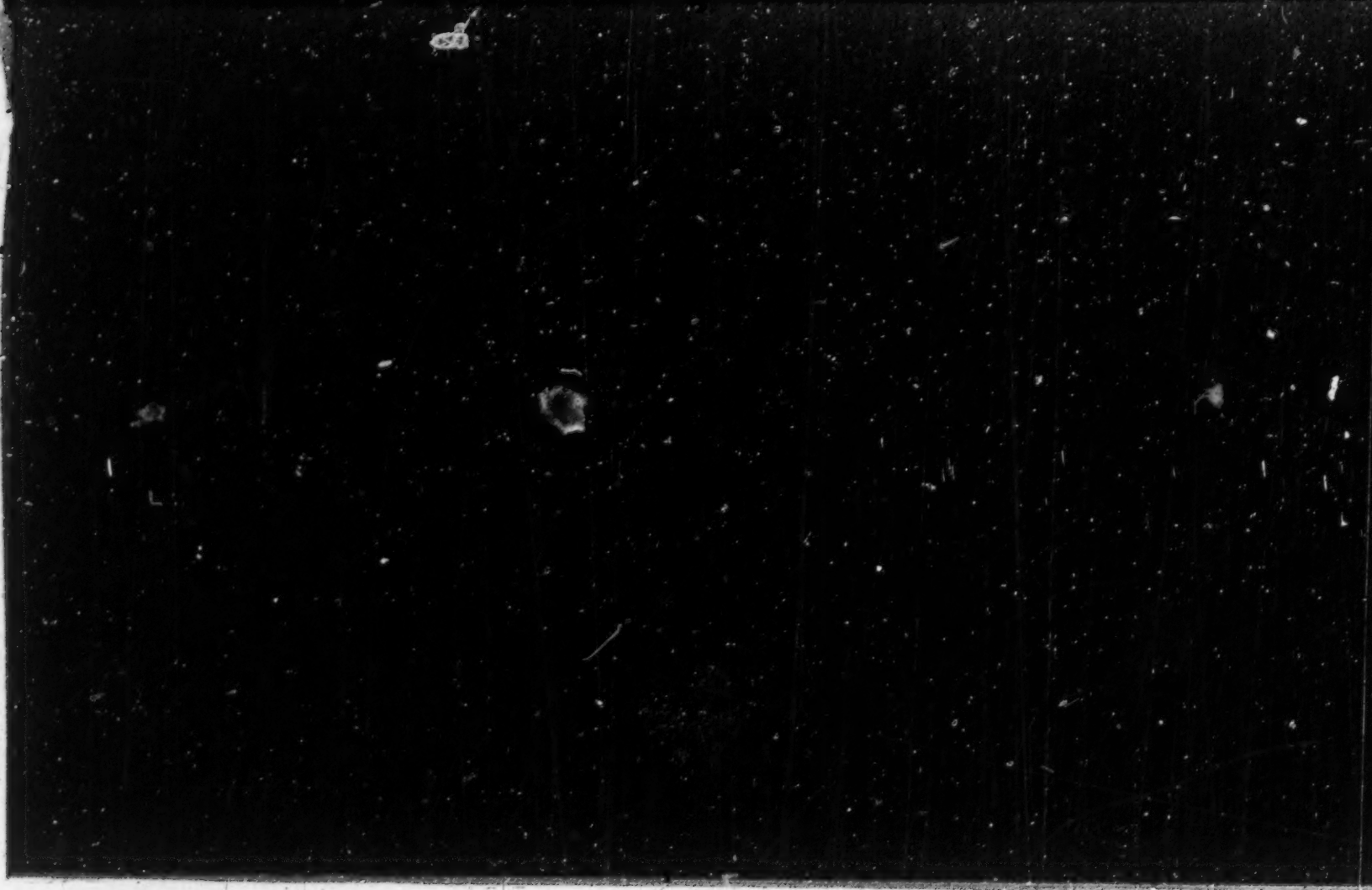
vs.

GERALD PURCELL FITZGERALD, INDIVIDUALLY AND AS TRUSTEE OF THE TRUSTS HEREINAFTER DESCRIBED, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED JUNE 14, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.



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[fol. 1]

IN COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

Sitting in Equity. No. 618

Between

JOSIAH V. THOMPSON, as Trustee for LYDA ELEANOR PURCELL Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the Trusts Hereinafter Described Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, Infants, by William McClelland, Their Guardian ad Litem, Plaintiffs,

And

GERALD PURCELL FITZGERALD, Individually and as Trustee of the Trusts Hereinafter Described; Charles E. Lenhart, as Trustee of the Trusts Hereinafter Described, Gerald Purcell Fitzgerald and Charles E. Lenhart, Partners as Fayette Coke Company and Shamrock Supply Company, Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants

[fol. 2] DOCKET ENTRIES

And now, To Wit: Oct. 27, 1910 Printed Bill of Complaint filed.

And now, Oct. 27, 1910, Petition of Lida Eleanor Purcell FitzGerald filed.

On October 27, 1910, petition herein presented, and upon consideration thereof the Court directs a citation to issue upon said Gerald Purcell FitzGerald and Charles E. Lenhart to show cause why the prayer of the petitioner should not be granted, returnable in ten days.

Oct. 27, 1910. Citation and two copies issued.

Now, November 3d, 1910, upon application on behalf of the defendant, Gerald Purcell Fitzgerald, it is ordered and decreed that an extension of ten days be granted to the defendants upon the order heretofore made October 27, 1910. Per Curiam. R. E. Umbel, P. J.

Nov. 11, 1910. Robinson, McKean & Martin, Michael J. Ryan, James Guy Gordon & William A. Stone by their

precipe, approved and filed enter therein appearance d. b. e. for Gerald Purcell Fitz Gerald, one of the above named defendants. Same day Johnson & Rush by their precipe approved and filed enter their appearance de bene esse for Charles E. Lenhart, one of the above named defendants. Same day Motion to set aside service filed.

And now, Nov. 11, 1910, Motion presented and ordered filed and placed on the Argument list.

Nov. 14, 1910. Citation returned.

Oct. 28, 1910. Served this writ on the within-named Gerald Purcell FitzGerald, individually and as trustee & [fol. 3] Charles E. Lenhart, trustee &., Gerald Purcell FitzGerald and Charles E. Lenhart, partners as Fayette Coke Co., and Shamrock Supply Company, Charles E. Lenhart, manager of Fayette Coke Co., and Shamrock Supply Co., defendant by handing a true and attested copy hereof to Charles E. Lenhart, personally (and by making known to him the contents thereof), together with a copy of plaintiff's bill. So. answers &c Peter A. Johns Shff. $4.50.

Now, November 30, 1910, this matter came on to be heard and was argued by counsel; and now, eo die, upon and after due consideration the order praying for transferring the suit to the Circuit Court of the United States for the Western District of Pennsylvania is refused. By the Court.

Now, Nov. 30, 1910, the petitioner, Gerald Purcell Fitzgerald by his counsel, excepts to the within order refusing to transfer the suit to the Circuit Court of the United States for the Western District of Pennsylvania and at his instance bill is sealed. Robert E. Umbel, P. J. (Seal.)

And now, Nov. 30, 1910, Separate Answer of Gerald Purcell FitzGerald, Defendant filed.

Nov. 30, 1910. Interrogatories to the Plaintiff, Josiah V. Thompson, filed Nov. 30, 1910 Motion to strike from the Record Petition for Receiver, etc. filed.

Nov. 30, 1910. Demurrer to Petition for appointment of Receiver etc. filed.

Dec. 6, 1910. Separate Demurrer of Charles E. Lenhart, Partner and Manager.

Dec. 6, 1910. Separate Answer of Charles E. Lenhart, Trustee.

Dec. 9, 1910. Replication to Separate Answer of defendant, Charles E. Lenhart filed.

Dec. 9, 1910. Replication to Separate answer of defend-[fol. 4] ant Gerald Purcell Fitz Gerald filed.

Dec. 12, 1910. Answer of Josiah V. Thompson Trustee to Interrogatories filed.

And now, December 22, 1910, the plaintiffs enter a rule for a Commission to be issued to Thomas H. D. Berridge, Esq., of No. 11 Old Broad Street, London, England, to take the testimony of witnesses on the annexed interrogatories, to be read in evidence on behalf of the plaintiffs on the trial of the entitled cause. Same day Service of the above rule is accepted by Robinson, McKean & Martin, Solicitors for defendant Gerald Purcell Fitz Gerald and by Johnson & Rush, Solicitors for the defendant Charles E. Lenhart.

Dec. 27, 1910. Exceptions of Gerald Purcell Fitzgerald to answer of Josiah V. Thompson, Trustee, to Interrogatories filed.

January 14, 1911. Cross interrogatories to be propounded to William T. Barnard K. C. and Sir Edward Carson K. C. on behalf of the defendant filed and defendant, Gerald Purcell Fitz Gerald names as Commissioner on his behalf, Richard Hazleton, Esq., House of Commons, London, England.

January 18, 1911. Exit Commission.

And now, February 4, 1911, the defendant, Gerald Purcell FitzGerald files Interrogatories and enters a rule for a commission to be issued to Alexander Pollock, 27 Ely Place, London, England and Ernest Bird, 5 Gray's Inn Road, London, England, or either of them, to take the testimony of Norman Craig, K. C. M. P., Edward Himmerde K. C., Robert Frederick Bayford, K. C., Arthur Houston, K. C., and W. E. Hume Williams, K. C. M. R. on interrogatories to be read in evidence on behalf of Gerald Purcell Fitz Gerald, the [fol. 5] the defendant above named, on the trial of the above-entitled cause. Same day Service accepted by W. J. Sturgis, Atty. for Plffs.

Feby. 11, 1911. Amendment to Commission filed. Same day Notice accepted by W. J. Sturgis, Atty. for Plffs.

Feby. 25, 1911. Cross interrogatories to be propounded to Norman Craig, K. C. M. P. Edward Himmerde K. C., Robert Frederick Bayford K. C., Arthur Houston K. C., W. E. Humes Williams K. C. M. P. Rt. Hon. Arthur Cohen P. C. K. C. on behalf of the plaintiff filed, and notice of filing accepted by Robinson, McKean & Martin, Attys. for defendant.

Feby. 25, 1911. Exit Commission.

Feby. 28, 1911. Supplemental answer of Josiah V. Thompson Trustee to Interrogatories filed.

March 15, 1911. Plaintiff's Request for finding of facts and conclusions of law filed. Same day Defendants request for finding of facts and conclusions of law filed. Same day Notes of Testimony filed. Same day Opinion and Decree of Court filed.

Now, March 3, 1911, this cause came on to be heard at this term and was argued by counsel; and now, March 15, 1911, thereupon, upon consideration thereof decree filed.

March 24, 1911. Printed Exceptions of Gerald Purcell FitzGerald defendant filed.

March 24, 1911. Additional Exceptions filed. March T. 1911 on Argt. list.

Now, Mar. 31, 1911, this being the time fixed by the Court for argument of the exceptions and additional Exceptions of Gerald Purcell Fitzgerald filed Mra. 24, 1911 in this cause, the parties by their counsel appear and are heard.

[fol. 6] And now, April 1, 1911 thereupon upon consideration thereof, it is ordered, adjudged and decreed that all of the said exceptions and additional exceptions be and the same are hereby overruled and dismissed.

By the Court.

Attest: Wm. McClelland, Prothy.

Now, April 1, 1911, the defendant, Gerald Purcell FitzGerald by his counsel excepts to the foregoing order and at his instance a bill is sealed.

Robert E. Umbel, President Judge. (Seal.)

April 5, 1911. Certiorari from Supreme Court received and filed. Same day Bond in the sum of $50,000.00 with George S. Harah as surety—filed and approved by R. E. Umbel, P.J. Same day assignments of error filed. Same day Certificate of Robert E. Umbel, President Judge that sum involved is over $1500.00.

April —, 1911. Record to Supreme Court.

Sept. 9, 1911, Bill of Costs $238.35 for printing paper book filed. Same day Notice of filing accepted and taxation agreed to by Robinson & McKean.

Feby. 21, 1912. Record from Supreme Court received with remittitur and filed Decree affirmed at Appellants costs also Certified Copy of Mandate from Supreme Court of the United States to Supreme Court of Pennsylvania appeal

from said Judgment of Supreme Court of Pennsylvania dismissed for want of jurisdiction, filed.

Mar. 6, 1912. Report of Trustees. To the honorable the Judges of said Court: Josiah V. Thompson, and Charles E. [fol. 7] Lenhart, trustees of the trust created by Indenture of December 6, 1906, beg leave to report to your Honorable Court that in pursuance of its decree rendered on March 15, 1911, which became absolute on February 21, 1912, they have by instrument of writing dated the 29 day of February, 1912, appointed William M. Thompson, of Menallen township, Fayette County, Pennsylvania, a competent and judicious person, as trustee of the trusts created by said Indenture of December 6, 1906, in place of Gerald Purcell Fitz Gerald, removed by decree of your Honorable Court (Signed) Josiah V. Thompson, C. E. Lenhart, Trustees.

Now, March 6, 1912, the within report of trustees presented to Court and directed to be filed. By the Court

Now, Jany. 27, 1915, petition of Charles E. Lenhart, presented to Court. And now, Febry. 4, 1915, upon consideration thereof, the Court appoints William W. Parshall, Esq., Trustee of the trusts created by the deed made Dec. 6, 1906 between Gerald Purcell Fitzgerald and Lida Eleanor Purcell Fitzgerald, the wife of Gerald Purcell Fitzgerald and Josiah V. Thompson, Charles E. Lenhart and Gerald Purcell Fitzgerald, Trustees, in the place and stead of William M. Thompson, since substituted as trustee, in the place of Gerald Purcell Fitzgerald and who has since resigned. By the Court.

Feby. 4, 1915. I hereby accept the appointment and accept the trust therein conferred upon me.

William W. Parshall.

Feby. 5, 1915. Certificate to Trustee issued.

[fol. 8] Now, Mar. 5, 1915, on petition of the trustees and defendant Gerald Purcell FitzGerald, the Court upon consideration modifies the decree made herein on March 15, 1911 so that the same may be better enforced and the provisions of said indenture of December 6, 1906 carried out according to the true intent and meaning thereof.

March 5, 1915. Petition and Decree filed.

Dec. 31, 1918. The within resignation of J. V. Thompson presented in Court and ordered to be filed. By the Court. Same day filed accordingly.

And now, Dec. 31, 1918, wherein petition for compensation of master presented in Court and ordered filed. By the Court. Same day filed accordingly.

Jany. 21, 1919. The within petition came on to be heard, and upon consideration thereof it is ordered, adjudged and decreed that his resignation be and hereby it is accepted and it being made to appear that the funds of trust, are intact it is further decreed that he be and hereby he is discharged from further discharge as trustee and from any further accounting. By the Court.

And now, January 21, 1919, petition of C. E. Lenhart to resign as trustee presented in Court, and after and upon due consideration thereof the other trustees thereto, it is ordered and directed that the resignation of the said Lenhart be, and hereby it is accepted, and that he be, and hereby he is discharged of and from any and all further duties, accountings and reckonings whatsoever for or on account of the said trust. By the Court.

[fol. 9] And now, January 21, 1919, petition for Confirmation of appointment of Trustee presented in Court, and after and upon due consideration thereof, it is ordered, adjudged and decreed that the selection and appointment of A. A. Thompson, as Trustee, under the agreement referred to in this case to take the place of C. E. Lenhart, resigned, made by the remaining Trustee, W. W. Parshall and G. S. Harah, be ratified, approved and confirmed, and that the said Thompson be, and hereby he is vested with all the rights and authorities, and charged with all the duties and responsibilities of trustee under the said agreement with like effect as if he had been named as one of the original trustees thereby and therein. By the Court.

Now, October 9, 1925, G. S. Harah, A. A. Thompson and William W. Parshall, Trustees in the above styled matter, present their financial report to the Court.

Now, October 9, the foregoing Account and Report is presented in open Court, and after due consideration thereof it is ordered filed and confirmed nisi.

Per Curiam.

Same day Trustees Report and Account filed.
Dec. 2, 1925. Affidavit of Publication filed.
Dec. 5, 1925. Affidavit of Publication filed.

Now, Dec. 7, 1925; the above Report and Account having
n presented in Court and no exceptions having been,
d thereto, the same is confirmed absolutely.

By the Court.

1.10] And now, June 3, 1930, the within appointment
sented in Court, approved and ordered filed. S. John
rriw, Judge. Same day appointment of Robert J. Arnett
Trustee to succeed G. S. Harah, dec'd filed.
uly 7, 1930. Second and Partial account of G. S. Harah,
W. Parshall and A. A. Thompson, Trustees, as stated
W. W. Parshall and A. A. Thompson, surviving Trustees
d July 26, 1930 Notice and Petition of John Purcell Fitz-
ald for removal to District Court of U. S. Western Penna.
d. Same day service of foregoing notice accepted the
d day of July, 1930, Higbee, Matthews & Lewellyn.
nd now, to-wit, the 26th day of July, 1930, the petition
sented in open Court and ordered to be filed, and it is
ther ordered that the time for filing Exceptions to the
d account be extended as to all parties in interest to
days after the disposition of the petition. D. W. Hender-
, Judge.
Now, July 26, 1930, Bond presented in Court and ordered
d in sum of $500.00. D. W. Henderson, Judge.
uly 26, 1930. Objection to Removal of Cause filed.
uly 26, 1930. The within Objection presented in Court
ordered filed. D. W. Henderson, Judge. Same day on
g. 1930, Argument list.
ug. 18, 1930. Affidavit as to Service of Notice filed.
Now, January 6, 1931, upon and after due consideration, it
rdered that the petition of John Purcell Fitzgerald for
1.11] removal of this case to the United States District
rt for the Western District of Pennsylvania be and the
e is hereby refused and the petition dismissed. It is
ther ordered that the time within which exceptions may
filed to the account by any person interested shall be
the same is hereby extended until fifteen days from
date. By the Court. D. W. Henderson.
an. 14, 1931. Notice of decree as of Jan. 6, 1931 and
eptance of service filed.
nd now, January 26, 1931, time to file exceptions to the
der of the Court under date of January 6th, 1931, is
ended until Feb. 16, 1931. By the Court. D. W. H.

Feb. 16, 1931, Exceptions to the Second and Partial Account of G. S. Harah, W. W. Parshall and A. A. Thompson, Trustees, on the part of Gerald Purcell Fitzgerald.

On May 1931, Argt. list.

On Aug. 1931, Argt. list.

Now, November 6th, 1933, order filed.

March 11, 1937. Resignation of Andrew A. Thompson filed.

And now, March 11th, 1937, the within resignation of Andrew A. Thompson as Trustee is hereby accepted and allowed, and it is ordered and decreed that upon due accounting, he be discharged from the duties and liabilities of such trustee.

By the Court.

H. A. Cottom, J.

Attest: John J. Brady, Prothonotary.

[fol. 12] Now, May 1, 1937, the within petition presented in Court ordered filed and Wednesday, May 26, 1937 for hearing before Court in banc.

Thos. H. Hudson, President Judge.

Attest: John J. Brady, Prothonotary.

Same day, Petition to Restrain Prosecution by Lida, Princess of Thurn & Taxis, and her son, John, against the Trustees in District Court of the United States for the Western District of Pennsylvania, at No. 2451 In Equity filed.

And now, June 1st, 1937, the within order filed. Same day, rule issued as to John Purcell Fitzgerald.

June 1st, 1937. Issuance of rule waived and service accepted on behalf of Lida Princess of Thurn & Taxis, one of respondents.

R. Murry Gibson, Jr. Chas L. John.

Now, June 17, 1937, Answer to Petition and Rule to Show Cause of Princess Lida of Thurn and Taxis, one of the Respondents filed. Decree making absolute rule to show cause filed.

And now, June 29, 1937, at the instance of defendants, an exception is noted and a bill is sealed.

Thomas H. Hudson, President Judge.

Attest: John J. Brady, Prothonotary.

Now, July 6, 1937, Certiorari from Supreme Court of [fol. 13] Pennsylvania received and filed, returnable first Monday of September, 1937.

Now, July 7, 1937, Notice of Appeal and acceptance of service of E. T. Chamberlin, filed.

Now, July 7, 1937, Notice of Appeal and Acceptance of Service by E. C. Higbee, and Dean D. Sturgis, Attorneys for Appellees, filed.

Acceptance of Service.

And now, to-wit, this 6th day of July, 1937, service accepted of copy of the above Notice.

Thomas H. Hudson, President Judge.

Attest: John J. Brady, Prothonotary.

Now, July 14, 1937, Testimony filed.

Now, July 16, 1937 Petition of A. A. Thompson, R. J. Arnett and John S. Harah, Administrators of G. Shell Harah, deceased, filed.

And now, July 16, 1937, order filed.

Now, July 19, 1937, Third and Partial Account of W. W. Parshall, A. A. Thompson and R. J. Arnett, Trustees of two separate Funds, called "Alimony Fund" and Children's Fund filed.

Now, July 26, 1937, Answer to Order to Show Cause filed.

July 26, 1937. We hereby accept notice of the filing of the within answer and acknowledge to have received a copy of same.

Morrow & Sturgis, Higbee, Matthews & Lewellyn,
Attorneys for Petitioners.

Now, August 11, 1937, Certificate of Charles Crow Hubbard, M. D. filed.

[fol. 14] Now, August 12, 1937, Proof of Notice filed.

Now, August 17, 1937, Exceptions to Third and Partial Account filed.

Now, September 13, 1937, Testimony of First Hearing in Contempt proceedings brought against Walter P. Smart, Esq., and John Fitzgerald lodged.

Now, September 13, 1937, Testimony on Exceptions to Second and Partial Account of Trustees Lodged.

Now, September 13, 1937, Opinion filed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 15] In Court of Common Pleas of Fayette County

Bill of Complaint—Filed October 27, 1910

To the Honorable the Judges of Said Court:

Your orators complain and say:

Paragraph I

Your orator, the said Lida Eleanor Purcell FitzGerald, is a citizen of the State of Pennsylvania, having her domicile at Uniontown, in said County, and being temporarily, from time to time, abroad with her children, said John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, who are wards of the High Court of Chancery of England and are required, except as hereinafter set forth, to reside in England or Ireland.

Paragraph II

Your orator Josiah V. Thompson is a resident of Uniontown, Fayette County, State of Pennsylvania; and is also a trustee under the instrument hereinafter recited.

Paragraph III

At the time of the filing of this Bill, your honorable Court duly appointed William McClelland, Prothonotary, Guardian ad litem of the infant plaintiffs John Purcell Fitz-Gerald, Edward Maurice Fitzgerald, and Gerald Purcell Fitz-Gerald.

Paragraph IV

The defendant of Gerald Purcell FitzGerald is a resident of the Island of Waterford, Ireland, and is a subject of [fol. 16] the United Kingdom of Great Britain and Ireland, and owns the hereinafter described real estate, situate within the jurisdiction of this Court, and is a trustee under the instrument hereinafter recited.

Paragraph V

The defendant Charles E. Lenhart is a resident of Menallen Township, Fayette County, State of Pennsylvania, and engaged as manager of Fayette Coke Company, a partnership, and Shamrock Supply Company, a partnership; and is also a trustee under the instrument hereinafter recited.

Paragraph VI

Said Fayette Coke Company is a partnership, composed of the defendant Gerald Purcell FitzGerald, owning an undivided nine-tenths interest, and the defendant Charles E. Lenhart, owning an undivided one-tenth interest, and holding title to the hereinafter described tracts of coal and land, and operating thereon a coke plant, situate in said Menallen Township and within the jurisdiction of this Court.

Paragraph VII

Said Shamrock Supply Company is a partnership, composed of the defendant Gerald Purcell FitzGerald, owning an undivided nine-tenths interest, and the defendant Charles E. Lenhart, owning an undivided one-tenth interest, and operating a general merchandising store at the coke works of the Fayette Coke Company aforesaid, and within the jurisdiction of this Court.

[fol. 17] Paragraph VIII

By agreement, dated December 6, 1906, and recorded August 1, 1910, in Agreement Book 22, page 304, in the Recorder's office of Fayette County aforesaid, the defendant Gerald Purcell FitzGerald and the plaintiff Lida Eleanor Purcell FitzGerald agreed with each other and with the plaintiff Josiah V. Thompson and the defendant Charles E. Lenhart, for divers good and valuable considerations, in words as follows:

"This Indenture made the sixth day of December one thousand nine hundred and six between Gerald Purcell FitzGerald of the island Waterford in Ireland, (hereinafter referred to as 'the husband'), of the first part, Lida Eleanor Purcell FitzGerald, wife of the said Gerald Purcell FitzGerald (hereinafter referred to as 'the wife'), of the second part and Josiah V. Thompson of Uniontown, Pennsylvania, United States of America, Charles E. Lenhart of Uniontown aforesaid, and the said Gerald Purcell FitzGerald (hereinafter referred to as 'the trustees') of the third part. Whereas the husband and wife were married in the year 1899 and there has been issue of such marriage three children and no more, viz.: John Purcell FitzGerald born the 23rd September 1899, and Edward Maurice FitzGerald and Gerald Purcel FitzGerald twin children born

the 25th October 1900. And Whereas on the 21st February, 1906, the wife commenced proceedings in Ireland against the husband for a divorce and on the 5th day of December [fol. 18] 1906 a decree of divorce against him a mensa et thoro was pronounced on her said petition by the High Court of Justice in Ireland, and now the husband and wife hereby severally covenant and agree as follows:

1. The husband agrees to pay to the wife by quarterly payments alimony at the rate of Three Thousand Pounds per annum from the 5th day of December one thousand nine hundred and six to the twelfth day of August one thousand nine hundred and seven or to the date of the passing of the Act of Parliament dissolving her said marriage if passed earlier than the twelfth August one thousand nine hundred and seven the wife undertaking to make no application in the meantime to the Court for alimony.

2. As from the date of the passing of the Act of Parliament finally dissolving the marriage of the husband and wife and in consideration of the premises the husband will pay to the Trustees in trust and for the uses and purposes hereinafter set forth so much of his share of the profits accruing annually from and out of the properties known as the Fayette Coke Company and the Shamrock Supply Company situate at Shamrock near New Salem, Fayette County, Pennsylvania, United States of America, as will yield an annuity of Fifteen Thousand Dollars per annum for three years and after three years so much of his share of the said profits therefrom as will yield an annuity of Twenty Thousand Dollars per annum, the said [fol. 19] annuity or annuities respectively to be collected from the said companies and paid to the wife by and through the trustees in such lawful manner and at such times as they shall determine but not less often than in the sums of Five Thousand Dollars on January first, May first and September first, for the first three years and Five Thousand Dollars on December first, March first, June first and September first of each year after the said three years to be due and payable to the wife for and during the term of her natural life.

3. For the consideration aforesaid the husband will also pay to the Trustees out of the balance of his nine-tenths share of the profits arising out of the said two companies named above to be paid to and collected by the Trustees

from time to time from the passing of the said Act of Parliament in manner as follows to wit: One-third of his said share of the said profits after deducting the said annuities above provided for, such payments to be made to the Trustees at the end of each financial year of the said companies after the ascertainment of the said yearly profits, the first of such payments to be made on February first one thousand nine hundred and seven on the profits calculated as from the first of September one thousand nine hundred and six, and such payments shall be invested by them until a total sum of Three Hundred Thousand Dollars has accumulated in the hands of the Trustees, whereupon the Trustees shall pay to the wife on the first February One [fol. 20] thousand nine hundred and eight and on the first February in each succeeding year thereafter for and during her natural life one-half of the income received from the investment of the said Three Hundred Thousand Dollars or of so much thereof as at the date thereof shall have been received and invested by such Trustees and shall in their discretion either accumulate or expend the other half of such income for the benefit of the said children of the husband and wife, videlicit: John, Edward, and Gerald FitzGerald or the Trustees may pay the entire income to the wife in their absolute discretion until the eldest surviving child shall have attained the age of twenty-one years. In case the wife should die the entire income from the Trust Fund shall belong to the children. If all the children should die before the death of the wife the children's share of the income from the said fund may be paid to her in the discretion of the Trustees, and if not paid to her shall be paid to the husband or to his executors, administrators or appointees.

4. After any of the said children shall have attained the age of twenty-one years such child shall be entitled as of right to be paid his share in the one-half of the income of said Trust Fund, and the discretion of the Trustees to pay more than one-half of the entire income of the Trust Fund to the wife shall cease and determine. On the death of the wife after the youngest child has attained the age of [fol. 21] twenty-one years the Trustees shall pay or distribute the remainder of the Trust Fund and any accumulation thereon amongst said children or the survivor or survivors of them.

5. In the event of the death of the wife during the minority of the children and the death of all the children before attaining the age of twenty-one years the fund and any accumulations thereon shall be paid to the husband or to his executors, administrators or assigns. The share of the income of any child dying during the minority shall be paid to or appropriated for the benefit of the surviving child or children.

6. The Trustees for the said annuity funds and the said Trust Fund shall be three in number and any two of them may act for all and the decision of any two shall bind the three. The Trustees appointed by this instrument shall be the said Josiah V. Thompson, Charles E. Lenhart and Gerald Purcell FitzGerald. In the event of the death, resignation or permanent disability to act of any of the Trustees or of their successors such vacancy shall be supplied by the appointment made by the two remaining trustees or on their failure to so appoint either of the trustees and also the wife shall have the right to petition the Court of Common Pleas of said Fayette County, Pennsylvania, United States of America, to fill such vacancy or vacancies and power is hereby given to said Court to do the same, and all of the rights and duties imposed upon the Trustees herein [fol. 22] named shall attach to and belong to such new Trustee or Trustees.

7. In consideration of the benefits to be obtained by the foregoing provisions in her favor the wife hereby agrees that in the event of the act of divorce becoming law that any right she may have to dower, alimony or otherwise under the laws of any of the United States of America or of Great Briton or Ireland shall be extinguished by and merged in this agreement, the execution whereof by her shall be deemed and taken to be a waiver by her of all such rights to all intents and purposes as affecting the property of the husband.

8. And the husband for the consideration aforesaid covenants and agrees to and with the Trustees that he will not encumber or alien nor suffer to be encumbered or aliened any portion of his interest in said Fayette Coke Company and said Shamrock Supply Company without the consent of the Trustees until said fund of Three Hundred Thousand Dollars has been accumulated.

9. In case of disputes by any party interested as to the meaning of any of the foregoing provisions such dispute shall be settled and determined by the judgment and decision of the Trustees.

10. The Trustees join in the execution hereof for the purpose of declaring their acceptance of said Trust.

11. It is hereby agreed by and between the husband and [fol. 23] the wife that the following provisions relating to their said children shall take effect from the time of the passing of the said Act of Parliament, the present arrangements of the children spending two months with each parent continuing until then.

(a) The wife (except as to three consecutive months in each year) upon the demand of the husband, shall have the custody, control and maintenance of the said three children, and the husband agrees not to oppose their removal beyond the jurisdiction of the Courts of Great Briton or Ireland during nine months of any year.

(b) Upon the death of the wife custody, control and maintenance of the said children shall revert to the husband.

(c) The husband agrees that during the three months in which he may claim the society and companionship of the said children in any year they or either of them may be accompanied by a nurse, governess, tutor or servant appointed by the wife. The husband to give the wife at least two months' notice in each year of the particular three months of that year during which he desires their custody.

(d) The wife shall have the rights to the society and companionship of the three children during the nine months of any year, but agrees that they shall be sent to a boarding school in England to be agreed by the husband and wife, from the time when they reach the age of ten years, except as to the child Gerald, who need not go to a boarding school [fol. 24] before eleven years, and that while they are at school she will not remove them therefrom nor claim that more than half of any vacation or holiday enjoyed by the children shall be spent with her.

(e) The wife undertakes not to retain the children in residence in London during the months in which fog is prevalent or is likely to prevail.

12. The husband agrees not to challenge or controvert the fact that the wife enjoys the status of a citizen of the State of Pennsylvania, United States of America, and the wife undertakes if she continues to assume the husband's name until remarriage that she shall not style herself or be known as Mrs. Purcell FitzGerald unless in conjunction with the name of Gerald or Lida Eleanor.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first in these presents written.

Signed, sealed and delivered by the said Gerald Purcell FitzGerald in presence of George G. Lewis Ely Place, Holborn, E. C., Solicitor.

Gerald Purcell Fitzgerald (Seal.)

Signed, seal and delivered by the said Lida Eleanor [fol. 25] Purcell FitzGerald in presence of: John Pride, Sol. 19 Upper Ormond Quay, Dublin.

Lida Eleanor Purcell FitzGerald. (Seal.)

Signed, sealed and delivered by the said Josiah V. Thompson in presence of: Francis M. Semens, Jr., Ben Lomond St., Uniontown, Pa., Asst. Cashier, First Nat. Bank.

Josiah V. Thompson. (Seal.)

Signed, sealed and delivered by the said Charles E. Lenhart in the presence of Francis M. Semans, Jr., Ben Lomond St., Uniontown, Penna., Asst. Cashier First Nat. Bank.

Charles E. Lenhart. (Seal.)

(Proof for Record)

"Pennsylvania,
Fayette County, ss:

Be it known that on this first day of August A. D. 1910 before me a Notary Public of Pennsylvania, residing at [fol. 26] Uniontown, said county, personally appeared Francis M. Semans, Jr., who being duly sworn was examined by me and did depose and say as follows: That he is the Francis M. Semans Jr. who signed the attached indenture dated December 6, 1906 between Gerald Purcell FitzGerald, Lida Eleanor Purcell FitzGerald and Josiah V. Thompson and Charles E. Lenhart, having signed the same as a witness

to the signatures of said Josiah V. Thompson and Charles E. Lenhart; that he knows Gerald Purcell FitzGerald and Lida Eleanor Purcell FitzGerald and has seen each of them write and subscribe his and her respective names; that to his certain knowledge said Gerald Purcell FitzGerald and George G. Lewis who signed said instrument as a witness to the signature of Gerald Purcell FitzGerald, and Lida Eleanor Purcell FitzGerald and John Pride who signed said instrument as a witness to the signature of said Lida Eleanor Purcell Fitzgerald, are at this time out of and beyond the State of Pennsylvania and any point within the United States of America and cannot be had within the United States of America, but their exact location at this time abroad is not to deponent known; that he has carefully examined the signatures of said Gerald Purcell FitzGerald and Lida Eleanor Purcell FitzGerald attached to the foregoing instrument and signed thereto, and he believes said signatures to be in the genuine handwriting of said Gerald Purcell FitzGerald and Lida Eleanor Purcell FitzGerald [fol. 27] respectively; that he saw said Charles E. Lenhart sign and seal said instrument as his act and deed; and further saith not.

Frank M. Semans, Jr.

Certified to, sworn to and subscribed before me the date aforesaid. Geo. W. Semans, Notary Public. My commission expires end next session of Senate. (Notarial Seal.)

PENNSYLVANIA,
Fayette Co., ss:

On this August first A. D., 1910, before me a Notary Public of Pennsylvania, residing at Uniontown said county, personally appeared the within named Josiah V. Thompson and duly acknowledged the within instrument to be his act and deed and desired it to be recorded as such.

Witness my hand & notarial seal the date aforesaid.

Geo. W. Semans, Notary Public. My commission expires end of next session of Senate." (Notarial Seal.)

Paragraph IX

The property referred to in Paragraph 2 of the aforesaid agreement as "The Fayette Coke Company and The Shamrock Supply Company" consists of sundry parcels of real estate and a general merchandising store, title to which [fol. 28] vested in said defendant Gerald Purcell FitzGerald, and thereafter for the undivided one-tenth in said defendant Charles E. Lenhart, by the following instruments of record at Uniontown, in the Recorder's office of Fayette County, Pennsylvania, to wit:

No. 1

Jacob S. Hackney and Wife to Gerald Purcell FitzGerald.
Deed, Dated November 20, 1899.
Recorded March 7, 1900.
Deed Book 173, page 446.
Consideration $48,000.

Conveys two tracts of land in the Menallen and German townships, said county, the first being situate in the Menallen township and bounded by land of Edgar S. Hackney, Lidia Tracy, heirs of Joshua W. Scott, and public road; beginning at stone in line of Tracy heirs at corner of Edgar S. Hackney, thence by Tracy S. 73° 38' W. 43.44 P. to stone corner of J. W. Scott, by same S. 9° E. 130.18 P. to point in center of public road, by center of public road and John Hackney heirs N. 56 deg. E. 6 P. to stone in road, N. 24 deg. E. 48.8 P. to center of road, N. 57⅞ deg. E. 37.75 P. to center of road, and by Edgar S. Hackney, N. 25¾ deg. W. 80.64 P. to stone, place of beginning, containing thirty-five acres and twenty-seven perches more or less;

Second. Situate partly in German and partly in Menallen tp., and bounded by land of John Sapper, John E. Finley, [fol. 29] James Vail, James Campbell, Samuel E. Finley and public road leading from New Salem to Uniontown, beginning in center of road at corner of Samuel E. Finley, thence by Finley S. 18⅝ deg. W. 108.6 P. to post corner of James Campbell, and by Campbell and Vail S. 58 deg. 35' E. 142.9 P. to stone in John E. Finley line, by same N. 38⅜ deg. E. 108.3 P. to stone, S. 51 deg. E. 8.41 P. to stone, N. 38¼ deg. E. 39 P. to stone in line of John Sapper, N. 51½ deg. W. 8.35 P. to White Oak, thence by same N. 15 deg. 39' W. 22.42 P. to center of road, leading from New Salem

to Uniontown, by center of road N. 86¼ deg. W. 24.1 P. to center of road, and by center of road and John Hackney heirs N. 74 deg. 35' W. 105.35 P. to center of road, and by center of road and John Hackney heirs No. 77 deg. W. 48.17 P. to center of road at beginning, containing 140 acres and 40 perches more or less.

No. 2

Isabella Hackney to Gerald Purcell FitzGerald.
Deed, dated, November 18, 1899.
Recorded, March 7, 1900.
Deed Book 176, page 383.
Consideration, $70,511.71.

Conveys tract of land in said Menallen tp.: beginning in center of road from New Salem to Uniontown in line of [fol. 30] John Sapper, by Sapper N. 15 deg. 39' W. 116.38 P. to W.O.; by same N. 46 deg. W. 53.7 P. to stone; N. 25 deg. 20' E. 65.3 P. to W.O.; N. 44 deg. 33' E. 31.6 P. to line of Edgar S. Hackney; by Hackney N. 51 deg. W. 12.3 P. to post; by same N. 53⅛ deg. W. 38 P. to stone; by same N. 25¾ deg. W. 36.36 P. to center of road; and by road and Hackney S. 57⅞ deg. W. 37.75 P. to center of road, and by same and Hackney S. 24 deg. W. 48.8 P. center of road; and by same and Hackney S. 56 deg. W. 6 P. to center of road in line of Joshua Scott, and by Scott S. 9 deg. E. 18 P. to stone, the same 62½ deg. E. 8.25 P. stone, the same S. 63½ deg. W. 97.25 P. to line of Samuel E. Finley, by Finley S. 19⅞° E. 46.9 P., S. 72 deg. W. 10.5 P., S. 11⅝ deg. W. 84.4 P. to center of first mentioned road, and by road and said Finley and Hackney S. 77 deg. E. 68.4 P. to center of road; S. 74 deg. 35' E. 105.35 P. to center of road; and by Hackney S. 86¼ deg. E. 24.1 P. to center of road the place of beginning, containing 198 acres and 15 perches more or less.

No. 3

Edgar S. Hackney and Wife to Gerald Purcell FitzGerald.
Deed, Dated, January 20, 1900.
Recorded March 7, 1900.
Deed Book 178, page 85.
Consideration, $27,202.50.

Conveys tract of land in Menallen tp., beginning at stone corner of Rockwell and J. & H. H. Hackney, thence by Hack-

ney S. 25 deg. 28' E. 1927.5 ft. to stone, S. 52 deg. 36' E. [fol. 31] 822.4 ft. to corner of Sapper, by same N. 46 deg. 10' E. 345.6 ft. to W.O. tree, N. 66 deg. 48' E. 606.8 ft., N. 52 deg. 46' W. 642.7 ft., N. 18 deg. 31' E., 272.1 ft., S. 83 deg. 3' E. 255.7 ft., N. 68 deg. 52' E. 209.4 ft., N. 51 deg. 3' W. 1987 ft., S. 76 deg. 51' W. 788.5 ft. to beginning, containing 64.001 acres.

No. 4

Samuel C. Rockwell and Wife to Gerald Purcell FitzGerald.
Deed, Dated, January 18, 1900.
Recorded April 16, 1900.
Deed Book 178, page 208.
Consideration $343.88.

Conveys parcel of land in Menallen tp.: beginning at stake thence by FitzGerald formerly Edgar S. Hackney S. 75 deg. 6' W. 292.8 ft., and by Taylor Jeffries, formerly Thomas Scott, N. 51 deg. 42' W. 319 ft., by Lydia Tracy, formerly William Whitesides, S. 6 deg. 46' W. 275.6 ft. to beginning, containing 0.8597 of an acre.

[fol. 32] No. 5

Samuel E. Finley and Wife to Gerald Purcell FitzGerald.
Deed, Dated, June 6, 1900.
Recorded, June 6, 1900.
Deed Book 180, page 439.
Consideration $1245.00.

Conveys parcel of land in German tp.: Beginning in center line of Hackney Branch of S. W. P. R. R. on division line of Jacob D. Antram and S. E. Finley, thence by division line N. 44 deg. 8' E. 31.6 ft., thence parallel to and 30 ft. distant from said center line S. 64 deg. 22' E. 2118.6 ft., thence by a curve to left with radius of 4092 ft. a distance of 482.6 ft., thence N. 59 deg. 19' E. 36.9 ft., thence as in three preceding courses parallel to and 30 ft. distant from center line of said Railroad by curve to right with radius of 508 ft. a distance of 52.5 ft. to division line of S. E. Finley and Fayette Coke Co., thence by division line S. 23 deg. 29' W. 45.7 ft. to center line of said Railroad, and by

same course a further distance of 52.1 ft., thence parallel to and 30 ft. distant from center line of said Railroad S. 59 deg. 19' W. 9.7 ft., thence by curve to right with radius of 552 ft. a distance of 541.4 ft., thence as in two preceding courses parallel to and 30 ft. distant from center line of said Railroad N. 64 deg. 22' E. 2138.6 ft. to division line between S. E. Finley and Jos. D. Antram, thence by division line 44 deg. 8' E. 31.6 ft. to beginning, containing [fol. 33] 3.709 acres. Excepting and reserving however thereout and therefrom all the nine foot vein of coal underlying said tract of land, together with all mining rights and other rights, liberties and privileges, with release of damages which were previously conveyed by the first parties to Charles H. Foote by deed of July 10, 1899, Deed Book 159, page 324. And subject also to the option contained in said Deed to said Foote, his heirs and assigns, to purchase any part of said tract, or parcel of land herein conveyed at a price mentioned in said deed, together with the right and privileges irrevocable to the said Gerald P. FitzGerald, his heirs and assigns, of surveying and locating and of constructing and erecting on said tract of land such railroad tracks and appurtenances, buildings, improvements, structures and fixtures as he shall deem proper; and also for the same consideration and the further consideration hereinafter mentioned, the parties of the first part for themselves, their heirs and assigns do hereby release the said Gerald P. FitzGerald, his heirs and assigns, from all claims, demands, costs and charges for or on account of any and all damages by reason of the location, construction and maintenance of the said buildings, improvements, structures or fixtures, on and over the said land; as a further consideration of the foregoing grant the said FitzGerald for himself, his heirs and assigns, by the acceptance of this conveyance hereby agrees to construct two good crossings, [fol. 34] etc.—this conveyance is delivered by the first party and accepted by the second party upon the express agreement that in case the said Foote, his heirs and assigns shall hereafter purchase any part of said land on the terms of said option for any other purpose than for the use and benefit of the said FitzGerald, his heirs and assigns, the said Finley will in that case refund to the said FitzGerald a proportionate part of the consideration above correspond-

ing to the portion of said land hereby conveyed which shall be so purchased by him.

No. 6

Joseph D. Antrim and Wife to Gerald Purcell FitzGerald.
Deed, Dated, June 6, 1900.
Recorded June 13, 1900.
Deed Book 184, page 33.
Consideration $2,000.00.

Conveys right-of-way for the location construction and maintenance of a railroad as the same has been finally located and determined by the party of the second part 60 ft. in width over, through and across that certain tract of land in Menallen tp. bounded by lands of S. E. Finley, John Antrim, George Hess and others, being the residence property of said Joseph D. Antrim, the grantor, which right-of-way is described as follows: Beginning at stone on division line of Joseph D. Antrim and George W. Hess, thence N. 51 deg. 57′ W. 20.7 ft. to corner common to Joseph [fol. 35] D. Antrim, George W. Hess and Naomi Dearth, thence to a corner N. 37 deg. 51′ E. 156 ft. along division line of Joseph D. Antrim and Naomi Dearth, thence N. 10 deg. 11′ E. 60.9 ft. along said division line, thence parallel to and 30 ft. distant from center line of Hackney Branch of S. W. P. R. R. N. 39 deg. 41′ E. 292 ft., thence by curve to right with radius of 740 ft. a distance of 1211.2 ft. thence 47 deg. 19′ E. 467.3 ft., thence by curve to left with radius of 1403 ft. a distance of 417.4 ft., thence as in four preceding courses parallel to and 30 ft. distant from center line of said Railroad, S. 64 deg. 22′ E. 398 ft. to point off the division line between Joseph D. Antrim and S. E. Finley, thence along said division line S. 44 deg. 8′ W. 31.6 ft. to center line of said railroad, thence by same course 31.6 ft. further, thence parallel to and 30 ft. distant from the center line of said railroad, N. 64 deg. 22′ W. 378 ft., thence by a curve to the right with a radius of 1463 ft. a distant of 435.2 ft., thence N. 47 deg. 19′ W. 467.3 ft. thence by curve to left with a radius of 687 ft. a distant of 1118.8 ft., thence as in four preceding courses parallel to and 30 ft. distant from the center line of said railroad S. 39 deg. 41′ W. 499.3 ft. to point in division line between Joseph D. Antrim and George W. Hess, thence by said division line N. 70 deg.

57′ W. 4.5 ft. to stone place of beginning, containing 3.922 acres.—And the said parties of the first part hereby release [fol. 36] unto the said party of the second part, his heirs and assigns, and any party or company operating said railroad, any and all damages accruing to the parties of the first part by reason of the location, construction and maintenance of the said railroad through the lands upon the right-of-way aforesaid.

No. 7

John L. Sapper, et al. to Gerald Purcell FitzGerald.
Deed, Dated, September 23, 1902.
Recorded, January 7, 1903.
Deed Book 207, page 236.
Consideration $136,138.75.

Conveys tract of land in the Menallen tp., bounded by land of Central Connellsville Coke Co., J. Johnson, other land of said John L. Sapper, Fayette Coke Co. and Mrs. Ben Williams; beginning at limestone corner of lands of Mrs. Ben Williams and Central Connellsville Coke Co., thence by and along the latter S. 52 deg. 50′ E. 1053.9 ft. to stone, S. 65 deg. 17′ W. 576.2 ft. to Walnut, S. 77 deg. 42′ W. 368.6 ft. and by land of J. Johnson S. 24 deg. 18′ E. 2040 ft. and John L. Sapper S. 69 deg. 7′ W. 301.1 ft., N. 75 deg. 12′ W. 350.3 ft., N. 66 deg. 64′ W. 226.8 ft., S. 10 deg. 53′ W. 206.5 ft., S. 1 deg. 13′ E. 792 ft., S. 32′ E. 153.3 ft., S. 28 deg. 19′ W. 74.8 ft., S. 48 deg. 49′ W. 477.6 ft., S. 53 deg. 23′ W. 243.3 ft. to stone on line of Fayette Coke Co. [fol. 37] and by Fayette Coke Co. N. 15 deg. 15′ W. 1347.9 ft., N. 45 deg. 40′ W. 883.7 ft., N. 25 deg. 27′ E. 1074 ft., N. 45 deg. E. 867.6 ft. and by Mrs. Ben Williams N. 67 deg. 14′ E. 721.3 ft., N. 7 deg. 3′ W. 656.3 ft. to beginning, containing 108.911 acres.

No. 8

George W. Hess and Wife to Gerald P. FitzGerald.
Right of Way Deed, Dated, June 2, 1900.
Recorded June 6, 1900.
Deed Book 179, page 496.
Consideration $1,000.

Conveys right of way over tract of land in German tp.: beginning in division line of Hess and Joseph D. Antrim,

thence by division line S. 70 deg. 57' E. 4.5 ft. thence parallel and 30 ft. distant from center line of Hackney Branch of S. W. P. R. R. S. 39 deg. 41' W. 423.1 ft., thence by curve to left parallel with said center line, with radius of 1012 ft., a distance of 1046.6 ft. to north side of G. W. Hess land and land occupied by Masontown & New Salem R. R. Co. for right of way, thence by said line by curve to the left with radius of 1940 ft., a distance of 183 ft. to center line of Hackney Branch of S. W. P. R. R., thence by same curve and radius a further distance of 88.3 ft., thence by curve to right with radius of 1072 ft. parallel to and 30 ft. distant from center line of Hackney Branch, a distance of 834.5 ft., thence parallel to and 30 ft. distant from center line, N. 39 deg. 41' E. 220.5 ft. to division line of Hess and Naomi [fol. 38] Dearth, thence by division line S. 51 deg. 57' E. 30 ft. to center line of Hackney Branch; thence by same line and course a further distance of 25.7 ft. to beginning, containing 1.817 acres. Together with the mining rights, liberties and privileges in deed from George W. Hess and wife to Charles H. Foote, dated July 20, 1899, Deed Book 170, page 231. It is expressly understood that the strip of land herein conveyed is for railroad right of way and is not in fee simple, and in case said strip of land is abandoned by disuser for a period of one year at any time as a railroad, it shall immediately on the expiration of one year revert to said George W. Hess, his heirs and assigns.

No. 9

Gerald Purcell FitzGerald and Lida E. N., his wife, to Charles E. Lenhart.
Deed, Dated, June 13, 1903.
Recorded July 9, 1903.
Deed Book 213, page 437.
Consideration $50,000.

And in further consideration of covenants to be kept and performed by the said party of the second part as herein contained and set forth, and in consideration of the covenants contained in a certain agreement in writing between the said Gerald Purcell FitzGerald and the said Charles E. Lenhart of even date herewith and to be recorded—Conveyed all the undivided one-tenth of those parcels of land situate in Fayette County, Penna., to wit: (Here

[fol. 39] follows the first described tract hereinabove conveyed to FitzGerald by said deed of Jacob S. Hackney and wife; also Edgar S. Hackney tract third above described; also Rockwell tract fourth above described; also Isabella Hackney tract second above described; also John Sapper, *et al.* tract seventh above described.)—Including all the Coke ovens, pumps, tipples, haulage appliances, shafts, slopes, tracks, pit wagons, railroad sidings, switches, cars, and all the implements, appliances and equipments used in and about those certain coal mines, and coke ovens known as The Fayette Coke Co.—(Next follows the undivided one-tenth interest in the three railroad rights-of-way conveyed by Hess eighth above described; and by S. E. Finley fifth above described, and by Joseph D. Antrim sixth above described.)—It is distinctly understood by and between the parties hereto that the interest hereby conveyed in said rights-of-way is subject to all exceptions, reservations and covenants contained in said deeds for the same to the said Gerald Purcell FitzGerald, and the said Charles E. Lenhart by the acceptance of this deed assumes and agrees to be liable in proportion to his interest in said rights-of-way for the performance of the covenants entered into by the said FitzGerald when he accepted said deeds for said rights-of-way, which covenants are particularly specified in said deeds.

[fol. 40] No. 10

Connellsville Central Coke Co. to Gerald Purcell FitzGerald and Charles E. Lenhart.

Deed, Dated, December 20, 1907.
Recorded January 14, 1908.
Deed Book 281, page 139.
Consideration $1.00, etc.

Conveys all the coal of the nine foot or Connellsville vein of coal underlying two parcels of land in Menallen tp.; First: beginning at stake corner to land of second parties formerly the John Sapper tract, thence by Sapper tract N. 86 deg. 15′ W. 92.05 ft. and by other lands of second parties formerly Hackney tract N. 58 deg. 8′ W. 218 ft., thence by the Williams tract of which this piece is a part N. 51 deg. 2′ E. 320.12 ft. to stake in lane of Sapper tract, thence by Sapper tract S. 4 deg. 59′ E. 323.64 ft. to beginning, containing 1.095 acres;

Second. Beginning at stake at side of public road at line of second parties formerly Hackney tract, thence by public road and Hackney tract S. 83 deg. 30' E. 290.71 ft. to corner of Williams tract of which this is a part, thence by Williams tract S. 43 deg. 23' W. 448.92 ft. to Hackney line, by Hackney tract N. 58 deg. 8' W. 101 ft., by same N. 19 deg. E. 323.44 ft. to beginning, containing 1,564 acres. Together with the right to mine and remove every part of said coal under the tracts aforesaid and without being re- [fol. 41] quired to provide for the overlying strata or surface and without being liable for any injury to the same or to anything therein or thereon by reason thereof, and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever for the transportation of the said coal, etc., and to coal materials and other things from and to other lands.

And the said FitzGerald and Lenhart conveyed out of said properties several parcels thereof by these instruments of record in said Recorder's office of Fayette County, viz.:

No. 1

Gerald Purcell FitzGerald and Lida Niccolls, his wife, by R. W. Playford and A. H. Reeder, Attorneys-in-Fact, to South West Penna. R. R. Co.
Deed, Dated, August 8, 1900.
Recorded March 29, 1906.
Deed Book 244, page 271.
Consideration, $1.00, etc.

Conveys: 1st, 1.817 acres of George W. Hess tract, excepting the nine foot vein of coal and mining rights; being the right-of-way eighth above described; 2nd, 0.135 of an acre, subject to prior sale of coal; 3rd, 3.022 acres, being the Antrim right-of-way sixth above described; 4th, 3.709 acres, excepting coal and mining rights; 5th, 4.228 acres.

[fol. 42] No. 2

Gerald Purcell FitzGerald and Charles E. Lenhart, and Carrie, his wife, to School District of Menallen Tp.
Deed, Dated August 1, 1905.
Recorded July 24, 1906.
Deed Book 256, page 420.

Conveys 15,000 sq. ft. of land in Menallen tp. on south side of road leading from New Salem to Uniontown. To revert if used for other than school purposes.

No. 3

Gerald Purcell FitzGerald, and Mabel Marie [redacted]cell, his wife, and Charles E. Lenhart, and Carrie, his wife, to Connellsville Central Coke Co.

Deed, Dated, November 6, 1907.
Recorded, January 14, 1908.
Deed Book 278, page 48.

Conveys all the nine foot or Connellsville vein of coal under three parcels of land in Menallen tp.:

1st. Containing 1.049 acres; part of John Sapper tract;
2d. Containing 0.117 acres; part of Hackney tract;
3d. Containing 0.687 acres; part of Rockwell tract;

together with mining and other rights.

[fol. 43] No. 4

Fayette Coke Company to The Trotter Water Co.
Right of Way Deed, April 22, 1907.
Recorded July 26, 1907.
Deed Book 273, page 289.
Consideration, $303.75.

Conveys right of way to lay, maintain and operate a pipe line for transportation of water, oil and gas through and across the premises of the first party in Menallen tp.

No. 5

Gerald Purcell FitzGerald and Mabel Marie Purcell, his wife, and Charles E. Lenhart and Carrie, his Wife to Penna. R. R. Company.

Deed, Dated May 25, 1908.
Recorded June 10, 1908.
Deed Book 281, page 333.

Conveys 0.114 of an acre, being part of the Jacob Hackney tract.

Paragraph X

Said Shamrock Supply Company is a partnership, operating a general merchandizing store, at and in connection

with the coke works of said Fayette Coke Company, in a building on the land of said defendants FitzGerald and Lenhart. The value of the stock handled annually by said [fol. 44] Supply Company is approximately $50,000, and the gross profits are approximately $10,000, annually, with net profits annually of about $7,000, increasing considerably when said coke works are in full operation.

Paragraph XI

The fair market value of the said properties of the Fayette Coke Company, owned by the defendants FitzGerald and Lenhart in the proportions aforesaid, is at least $1,000,000; and the operation of their coke works shows gross sales of coke and coal annually as follows:

Of Coke, approximately, $250,000 worth
Of Coal,
Rents and farm products, 8,000, approximately.

And the cost of mining said coal and making said coke and operating said farms (without any sinking fund allowance) is approximately $160,000 annually; leaving a net difference for profit on operation, of, at this time, about $90,000, which is much increased when the coke works and store are in full operation and the price of coke is at the average price of good and bad times.

Paragraph XII

An Act of Parliament dissolving the marriage between the said Gerald and the said Lida Eleanor was duly passed subsequent to December 6, 1906; and thereafter, pursuant to the provisions of the aforesaid agreement of December 6, 1906, the profits from the operation of said Fayette Coke [fol. 45] Company and said Shamrock Supply Company have been until the date hereinafter mentioned, distributed by the defendant Charles E. Lenhart as manager thereof, according to the provisions of said agreement and according to the rights of the various parties interested under said agreement, a proper proportion thereof, having been annually and regularly paid to said trustees for the benefit of said plaintiff Lida Eleanor Purcell FitzGerald, and another portion thereof paid to said trustees toward the accumulation of the $300,000 fund held for the children of said Gerald Purcell FitzGerald and Lida Eleanor Purcell

FitzGerald, and for said plaintiff Lida Eleanor Purcell FitzGerald, and the balance thereof paid to said defendants FitzGerald and Lenhart as partners and owners in their said proportions of nine-tenths and one-tenth respectively, up to June 30, 1910, at which time there was a regular payment due to the trustees for each of said two purposes or funds, but said payment was not then nor at any time since nor before paid, but has been withheld, and said defendant Lenhart, as manager of said properties, has failed and refused to pay the same to said trustees, and has notified said trustees that he will not pay the same, alleging that he has been so instructed by said defendant Gerald Purcell FitzGerald, his partner and co-trustee. And your orator Josiah V. Thompson has received the following communication from the defendant Lenhart on the subject, to wit:

[fol. 46] "New Salem, Pa., June 23, 1910.

J. V. Thompson, C. E. Lenhart, G. P. FitzGerald, Trustees for Lida E. FitzGerald, John FitzGerald, Edward FitzGerald, Gerald FitzGerald.

You are hereby notified that G. P. FitzGerald has instructed me, as his business manager, not to pay to the trustees, Alimony or to Children's Fund, amounts due June 30th, 1910.

C. E. Lenhart, Business Manager.

Copy to J. V. Thompson, C. E. Lenhart and G. P. FitzGerald."

And your orators aver, that said defendant Gerald P. FitzGerald, his co-trustee, did, in writing, instruct said defendant Lenhart, as his business manager at said coke works and said store, to refuse to pay either said wife's allowance or to said children's and wife's fund coming due June 30, 1910; further averring, that said defendant Gerald Purcell FitzGerald, by his attorney and counselor at law, specifically notified said defendant Lenhart not to make any payment whatsoever to said Lida Eleanor Purcell FitzGerald, or for or on her account, from or out of any funds belonging to said defendant Gerald Purcell FitzGerald, or from or out of any funds of his or property over which he has any connection or control, in or relating to said Coke [fol. 47] Company or any other company which the said

Lenhart may manage for the said defendant FitzGerald, and this on or about June 23, 1910.

Up to said June 30, 1910, the trustees had received, pursuant to the terms of the aforesaid agreement, the sum of $39,990 on account of the fund of $300,000 directed to be accumulated by them, and said trustees still hold said funds and have invested the same pursuant to the directions of the aforesaid agreement.

Paragraph XIII

Your orators further aver, that the defendant Gerald Purcell FitzGerald has violated his trust, in that he has forbidden the defendant Lenhart, his manager of the abovenamed properties, to pay over any part of the profits therefrom to the said trustees for the purpose recited in said agreement of December 6, 1906, and in that he has thus made it impossible for said trustees to receive or pay over to the parties entitled thereto the sums contemplated and set apart by the terms of said agreement, and in that the defendant FitzGerald, as your orators are informed and believe, has wholly repudiated the aforesaid agreement and declared the same not binding on him, and in that he refuses, as one of said trustees, to receive, apply or pay over any part of the said income and trust fund provided for in said agreement, and thereby prevents the due execution of the said trusts, and in that he refuses to act as in duty bound by the terms of said agreement, and refuses to perform his duties as prescribed in said trust instrument. The [fol. 48] defendant FitzGerald, by reason of the matters aforesaid, and of the antagonism between his interests as an individual and his duties as trustee, is a wholly unfit person to continue to act as trustee under the aforesaid agreement.

Paragraph XIV

Your orators further aver, that the defendant Lenhart has violated his aforesaid trust, in that he has unquestioningly obeyed the direction of the defendant FitzGerald to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906, and has wholly failed and neglected to perform his duties as trustee since the aforesaid direction of the defendant FitzGerald, and has neglected and refused to exercise any independent judgment in the premises, as

is incumbent upon him as trustee; and said defendant Lenhart is entirely subject to the domination and control of the defendant FitzGerald, and by reason thereof and of his failure and refusal to perform his duties as trustee, and by reason of his antagonistic personal interests as partner of the defendant FitzGerald and as manager of the copartnership properties, is an unfit person to continue to act as trustee under the aforesaid agreement.

Prayer for Relief

Wherefore, your orators need equitable relief, and pray this Honorable Court, having jurisdiction under the law, as well as by the express terms of the aforesaid recited instrument, over the parties thereto and to be affected thereby, [fol. 49] and having jurisdiction over the said properties, all of which are situate within said County:

1. To remove the defendants FitzGerald and Lenhart from their respective offices of trustee under the aforesaid agreement, and to permit the vacancies to be filled by the plaintiff Josiah V. Thompson, or that said vacancies be filled by appointment by the Court, as trustees, of two proper persons.

2. To declare and establish a lien upon the properties of the copartnerships known as Fayette Coke Company and Shamrock Supply Company, for the benefit of the beneficiaries under the aforesaid agreement of December 6, 1906, as contemplated and provided therein, to secure the payment of the sums by said agreement provided to be paid.

3. To construe the trust agreement and establish the rights of the trustees and the rights and interests of the beneficiaries thereunder, and to instruct the trustees accordingly.

4. To require the defendants FitzGerald and Lenhart as members of the aforesaid copartnerships, to account for and pay over to the trustee now in office and the other trustees to be appointed, or to a sequestrator or receiver to be appointed herein, the proportion of the profits of the Fayette Coke Company and the Shamrock Supply Company provided by the aforesaid agreement of December 6, 1906, to be paid over to the trustees, and for such subsequent accountings as may be necessary during the term of the aforesaid agreement.

5. To appoint, pending this suit and the appointment of new trustees, a sequestrator or receiver, to whom the de- [fol. 50] fendants FitzGerald and Lenhart shall, within thirty days from the order of the Court in this case, render an account of the earnings and profits of said properties of the Fayette Coke Company and the Shamrock Supply Company for the nine months ending September 30, 1910, and thereupon pay over to the said sequestrator or receiver nine-tenths of said profits, and to whom the said defendants FitzGerald and Lenhart shall, from time to time thereafter, as this Honorable Court may direct, render account of the earnings and profits of said properties, and thereupon pay nine-tenths of said profits to said sequestrator or receiver; said amount so paid to said sequestrator or receiver to be thereafter paid out from time to time to the parties thereto entitled, under the direction of this Court.

6. To restrain, by its injunction, both pendente lite and permanent, the defendants FitzGerald and Lenhart, or either of them, and their or either of their agents, attorneys and servants, from in any wise alienating or encumbering any of the properties of the aforesaid copartnerships, to the prejudice of the trustees or beneficiaries under the aforesaid agreement of December 6, 1906.

7. For general relief.

Howell, Sturgis & Morrow, Guggenheimer, Untermyer & Marshall, Solicitors for Plaintiffs. Saml. Untermyer, of Counsel.

[fol. 51] *Duly sworn to by Josiah V. Thompson. Jurat omitted in printing.*

In Court of Common Pleas of Fayette County

Separate Answer of Gerald Purcell FitzGerald, Defendant

To the Honorable the Judges of the said Court:

The above-named defendant, Gerald Purcell FitzGerald, now and at all times saving and reserving unto himself all manner of objections and exceptions to the manifold errors in plaintiffs' Bill of Complaint, answering thereunto says:

1. I have no knowledge that the said Lida Eleanor Purcell FitzGerald is, as set forth in Paragraph 1 of plaintiffs' Bill, a citizen of the State of Pennsylvania, having her domicile therein at Uniontown. I know that in her petition to Parliament in 1907, and in an Act of Parliament founded thereon, passed July 26, 1907 (a copy of which is hereto annexed), she represented herself to be, and is referred to therein, as a subject of the King of Great Britain and Ireland, and as residing at Hyde Park Hotel, Knights Bridge, London, England. Since then she has resided most of the [fol. 52] time out of the United States. If the averment as to her residence be material, I pray that the plaintiffs shall prove the same. I admit the remaining facts set forth in said paragraph.

2. I admit the facts set forth in Paragraph 2 of plaintiffs' Bill.

3. I admit, as set forth in Paragraph 3 of said Bill, that the said William McClelland, Prothonotary, was appointed by your Honorable Court, Guardian ad litem of the infant plaintiffs, John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, but I deny that the said appointment was duly or lawfully made.

4. I admit the facts set forth in Paragraph 4 of plaintiffs' Bill.

5. I admit the facts set forth in Paragraph 5 of Plaintiffs' Bill.

6. I admit the facts set forth in Paragraph 6 of plaintiffs' Bill.

7. I admit the facts set forth in Paragraph 7 of plaintiffs' Bill.

8. I admit that the agreement set out in Paragraph 8 of plaintiffs' Bill, dated December 6, 1906, between the plaintiff Lida Eleanor Purcell FitzGerald and myself, is a correct copy of the agreement so made between plaintiff and myself; but I deny that the said agreement was made for "divers good and valuable considerations" as averred by Plaintiffs, but aver that the considerations for the said agreement were not good and valuable, but were unlawful and fraudulent considerations against public policy, as

hereinafter set forth in Paragraphs 13, 14, 15 and 16 of this Answer, and that the said agreement is null and void.

[fol. 53] I have no knowledge of the alleged record touching the recording of said contract set forth in said paragraph of plaintiffs' Bill, and I pray, if the same be material, that the plaintiffs shall make due proof thereof.

9. I believe the facts set forth in Paragraph 9 of plaintiffs' Bill to be substantially true, as therein set forth, but I have no means at present of accurately verifying their correctness.

10. I believe the facts set forth in Paragraph 10 of Plaintiffs' Bill to be approximately true, as therein set forth, but I have no means at present of accurately verifying their correctness.

11. I do not know whether the fair market value of the properties referred to in Paragraph 11 of plaintiffs' Bill is as therein set forth, and if the same be material, I pray that the plaintiffs may make due proof thereof.

I am unable to affirm or deny the accuracy of the approximate values set forth in the remainder of the said paragraph of plaintiffs' Bill, and if the same be material, I pray that plaintiffs may make due proof thereof.

12. I admit, as set forth in the first clause of Paragraph 12 of plaintiffs' Bill, that an Act of Parliament was passed subsequent to December 6, 1906, dissolving the marriage between the said Lida Eleanor Purcell FitzGerald and myself.

I deny that the payments made after December 6, 1906, pursuant to the provisions of the aforesaid agreement of that date, were distributed as averred in said paragraph by the defendant, Charles E. Lenhart, as Manager of the said Fayette Coke Company and the Shamrock Supply Com-[fol. 54] pany, but to the contrary thereof, aver that the said payments were made and the said sums were distributed by the defendant, Charles E. Lenhart, under said agreement, at my direction, he acting therein as my personal agent, making said payments and distributing said money for me and on my behalf.

I deny that a regular payment due to the Trustees named in said agreement, on June 30, 1910, was not then nor at any time since made, but was withheld by the said defend-

ant, Lenhart as Manager of the said property; but to the contrary thereof, I aver that the said payment was then, and has been since refused and withheld by the said Lenhart, as my personal agent, he acting therein by my personal direction, and in my personal behalf.

I have no knowledge that the plaintiff, Josiah V. Thompson, has received the communication from the defendant, Lenhart, set forth in Paragraph 12 of plaintiffs' Bill, and if the same be material, I pray that the plaintiffs may make due proof thereof; but I admit that I personally instructed the said defendant, Lenhart, not to pay to the Trustees, as set forth in said alleged letter, and I admit that my attorney and counsellor-at-law specifically notified the said defendant, Lenhart, not to make any payment to the said Lida Eleanor Purcell FitzGerald, or for or on her account out any of my properties. The reasons for my so instructing the said Lenhart are more fully and at length set out in Paragraph 17 of this Answer.

I believe it to be true, as set forth in the last clause of Paragraph 12 of plaintiffs' Bill, that up to June 30, 1910, the Trustees had received, pursuant to the terms of the aforesaid agreement, the sum of Thirty Nine Thousand Nine [fol. 55] Hundred and Ninety Dollars ($39,990) on account of the fund of Three Hundred Thousand Dollars ($300,000) directed to be accumulated by them; but I deny that the said Trustees still hold said funds, and have invested the same pursuant to the aforesaid agreement, but on the contrary thereof, I aver that the said Josiah V. Thompson in violation of his duties under said trust, and of the laws of this Commonwealth, and in bad faith as Trustee, has personally borrowed and used for his own personal benefit and behoof a large part of the said $39,990 which came into his hands as Trustee, for which reason, and for other reasons hereinafter set forth, I aver that the said Josiah V. Thompson is an unfit and improper person to act as Trustee, and to manage the funds of said trust, and as hereinafter prayed for, I ask that the said Josiah V. Thompson be removed from his office, as Trustee, in order that a competent and faithful person may be appointed in his stead, and that he, by decree of this Court, be compelled to repay said moneys so borrowed by him into said Trust Fund, and that he account to said Trust for all the income, profits, benefits and issues received by him, by or on account of the use

of said moneys while so illegally used and appropriated by him.

13. Answering Paragraph 13 of the plaintiffs' Bill, I admit that I have wholly repudiated the aforesaid agreement and declared the same not binding on me, and that I have refused, as one of the Trustees, to receive, apply or pay over any part of the said income and trust fund provided in said agreement, and that I have thereby prevented the [fol. 56] execution of the said trusts, and as my reason therefore, I aver as follows:

On the 16th day of February, 1906, I then being a British subject domiciled in Ireland, did file in His Majesty's High Court of Justice in Ireland, King's Bench Division (Matrimonial) a petition praying said Court to decree a divorce a mensa et thoro from my then wife, the said plaintiff, Lida Eleanor Purcell FitzGerald, wherein I did charge my said wife with adultery. On the 21st day of February, 1906, my said wife, Lida Eleanor Purcell FitzGerald, did file in the said High Court of Justice her petition against me, wherein she prayed for a divorce a mensa et thoro, and in which petition she did charge me with the offences of adultery and cruelty. The said causes were proceeded with and Bills of Particulars were filed by each of us in our said suits under orders of the said Court, setting forth the particulars of said offences so charged. During the said litigation, to wit: on or about the 3d day of September, 1906, my said wife and I did agree as follows:

That I would withdraw my petition for divorce against her, and that I would not contest per petition for divorce, but would admit the said charges of adultery and cruelty and facilitate her in procuring said divorce a mensa et thoro in said Irish Court, and that upon procuring such decree, as absolute divorces are not granted under the Irish law, she would proceed to apply for and secure an Act of Parliament, declaring an absolute divorce from the bonds of matrimony between her and me. In compliance with and pursuance of said agreement, I did on the 5th day of December, 1906, withdraw my said action for divorce and the charges [fol. 57] therein against my wife and did not contest my said wife's petition for divorce, and did make the admissions heretofore referred to. In consequence thereof, on the said 5th day of December, 1906, my said wife obtained a decree of said Court divorcing her a mensa et thoro. On

the succeeding day, to wit: December 6, 1906, in further pursuance of said agreement heretofore referred to, and in consideration of the said acts on her part and my part heretofore referred to, the contract or agreement set forth in plaintiffs' Bill, and which is the foundation of these proceedings, was entered into between her and me, the further consideration for said agreement on her part being, as set forth therein, the procurement by my said wife of an Act of Parliament divorcing her and me. I particularly call the attention of the Court to the second clause of said agreement as set forth in Plaintiffs' Bill, wherein the said consideration is set forth in the following language:

(a) "2. As and from the date of the passing of the Act of Parliament dissolving the marriage of the husband and wife, and in consideration of the premises, the husband will pay to the trustees in trust, &c."

and I call the attention of the Court to the third paragraph of the said agreement or contract, wherein the consideration for the same is again set forth in the following language:

(b) "3. For the consideration aforesaid the husband will also pay to the Trustees out of the balance of his nine-tenths (9/10's) share of the profits arising out of the two companies named above, to be paid to and collected by the [fol. 58] Trustees from time to time, from the passing of the said Act of Parliament in manner as follows, to wit:

and I call the attention of the Court to Clause 11 of the said contract or agreement, wherein it is provided as follows:

(c) "11. It is hereby agreed by and between the husband and the wife that the following provisions relating to their children shall take effect from the time of the passing of the said Act of Parliament, &c."

14. At the time that the said agreement was so as aforesaid entered into, to wit: December 6, 1906, the said Act of Parliament had not been passed or applied for, but thereafter, the said plaintiff, Lida Eleanor Purcell FitzGerald did, in pursuance of said agreement or contract so, as aforesaid entered into with me, make her petition and complaint to His Majesty, the King of Great Britain and Ireland that an act might be passed "by the King's Most Excellent

Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons" in Parliament assembled, divorcing her, the said Lida Eleanor Purcell FitzGerald from the bond of matrimony existing between her and me, her husband, and wholly dissolving, annulling, vacating and making void the same, and in consummation of said agreement and of the performance upon her part of the consideration for the said agreement, she did procure the passage by Parliament of said absolute divorce to wit: on the 26th day of July, 1907. A true copy of the said [fol. 59] Act of Parliament is hereto annexed marked "Exhibit 1."

15. I aver that the said agreement or contract set forth in plaintiffs' Bill, and which is the foundation of the present proceedings, and the covenants and conditions thereof sought to be enforced by this present action, were by the terms of the said contract to become operative only in the event of and when the said Lida Eleanor Purcell FitzGerald obtained the passing of said Act of Parliament. Wherefore, I do aver that the making of said agreement was against public policy, and that the same is wholly void and of no effect, and that the same is not enforceable and should not be enforced by this Honorable Court, but that the plaintiffs' Bill of Complaint should be dismissed.

16. I aver that all of the foregoing facts were fully known to the plaintiff, Josiah V. Thompson, who is the uncle of the said Lida Eleanor Purcell FitzGerald, and that in the making of said agreement, and in all the acts and negotiations leading thereto, the said Thompson, acting for his said niece, did instigate, induce and procure the said agreement to be entered into by my said wife and myself.

17. I deny that the breach of said contract took place upon my part, but to the contrary thereof, I aver that the said Lida Eleanor Purcell FitzGerald, in violation of the terms and conditions of the said agreement and the understanding of the parties thereto, and of a supplemental agreement made between us, dated March 4, 1907, a true copy of which is hereto annexed marked "Exhibit 2," has heretofore refused to pay for the education and maintenance of [fol. 60] our three children out of the moneys paid to her by me under the said agreement, and in consequence thereof I have been put to wholly unjust and improper charges

for the maintenance and education of our said three children, because of the neglect of the said Lida Eleanor Purcell FitzGerald, and because of her failure and refusal to observe upon her part the conditions of the said agreement, and because of her breach thereof, the expense to which I have thereby been put has been upwards of Five Thousand Dollars ($5000) yearly. Since September 18, 1909, the said Lida Eleanor Purcell FitzGerald has maintained and paid for the maintenance of said children only during eight (8) weeks and five (5) days, to wit: three (3) weeks at the Christmas Holidays of 1909; two (2) weeks and five (5) days at the Easter Vacation, 1910, and the last three (3) weeks of the September Vacation, 1910. During all the remainder of said time from September 18, 1909, until this present, the entire cost of the maintenance and education of the said children has been borne and paid by me, and I have been obliged to maintain them during all of said period and am now maintaining and educating them because the said Lida Eleanor Purcell Fitzgerald (except for the eight weeks and five days above mentioned) has wholly refused and neglected to maintain the said children or to pay for their maintenance and education, though frequently requested so to do. By her solicitors in England she has denied that she is liable for the maintenance and education of said children, notwithstanding the express provision of the said contract of December 6, 1906, and its supplement [fol. 61] of March 4, 1907, and notwithstanding the clear intent of the same.

The said Lida Eleanor Purcell FitzGerald does not maintain any home in England, where said children are, and under the order of the English Court are obliged to remain. Neither does she maintain a permanent home at any place, so that there is no home of their said mother to which the said children may go, and where they may be maintained and supported, as was contemplated and intended by the said agreement referred to. On the other hand, I have maintained at great expense, a home at the Island, Waterford, in Ireland, to which my children may at any time go, or be brought, and where they may be properly maintained in a manner conformable to their station in life, and where, at such times as I am allowed their custody, I do maintain them in a manner fit and conformable, as aforesaid. Were it not for the failure of their mother, the said Lida Eleanor

Purcell FitzGerald, to maintain the said children as heretofore set forth, and her neglect and failure to provide a home for them, I would, in consequence of the large sums of money required to be paid by me under the said agreement of December 6, 1906, have closed my said residence and home at the Island, Waterford, Ireland, but which, because of the breach of contract upon the part of the said Lida Eleanor Purcell FitzGerald I have been obliged to maintain as a home at great cost and charges, to wit: at an expense exceeding Fifteen Thousand Dollars ($15,000.00) yearly.

18. I aver that I have no purpose or desire not to provide properly for my children and to make due provision for [fol. 62] their fit maintenance, education and support, and that if it shall be adjudged that the said contract and agreement is void, I shall nevertheless voluntarily make and execute such necessary and proper agreements, trust and conveyances as shall secure to my said three children an amount equal at least to the sum of $300,000, the amount provided for as a Trust Fund in said agreement.

19. Answering Paragraph 14 of the plaintiffs' Bill, so far as the same has relation to facts within my knowledge, I deny that the defendant, Lenhart, "has violated his aforesaid trust in that he has unquestionably obeyed the directions of the defendant, FitzGerald," as recited in said paragraph. The said Lenhart, in observing my directions not to pay any further moneys under said contract, acted, not as Trustee, but as my personal agent, and, as he was in duty bound as such agent, did follow my directions, instructions and authority. And I further aver that, as such agent, he had no power to pay moneys under said contract except by my order and direction. I deny that the said Lenhart is subject to my domination and control, and that by reason thereof he has failed and refused to perform his duties as Trustee, and I deny that he has any antagonistic personal interests, as Manager of the co-partnership properties, which unfit him to continue to act as Trustee under the aforesaid agreement. On the contrary thereof, I aver that his position as Manager of the said Companies enables him the better to know the profits of the said Companies and the amounts which, by the terms of the said agreement, I am [fol. 63] to pay thereunder. I deny that the said Lenhart has failed to perform his duties as Trustee, but aver that

he has performed all the duties of the said Trust which he might lawfully do and perform.

Wherefore, I respectfully pray your Honorable Court as follows:

(1) To declare, adjudge and decree that the said contract, in plaintiffs' Bill referred to, dated December 6, 1906, is null and void.

(2) That the said Josiah V. Thompson, plaintiff, be removed from his office as Trustee of the children's Fund, provided for in said contract of December 6, 1906.

(3) That the said Josiah V. Thompson, plaintiff, be required to account to the Trustees of said Fund for all the rents, issues, profits and income, which have in anywise accrued to him, or to which he may be entitled, by reason and on account of his said unlawful, personal use and appropriation of the moneys in his hands, as aforesaid.

(4) That I may be hence dismissed with my reasonable costs in this behalf expended.

Duly sworn to by Gerald Purcell FitzGerald., Jurat omitted in printing.

[fol. 64] EXHIBIT 1 TO ANSWER

An Act to Dissolve the Marriage of Lida Eleanor Purcell FitzGerald with Gerald Purcell FitzGerald Her Present Husband and to Enable Her to Marry Again and for Other Purposes. (26th July 1907.)

A. D. 1907.

Humbly sheweth and complaineth unto Your most Excellent Majesty your true and faithful subject Lida Eleanor Purcell FitzGerald now residing at Hyde Park Hotel Knightsbridge in the county of London the wife of Gerald Purcell FitzGerald of the Island Waterford in the county of Waterford Ireland gentleman:

That in the 1st day of March 1899 your subject then Lida Eleanor Nicolls spinster the daughter of John A. Nicolls of Uniontown Pennsylvania in the United States of America, was lawfully married at the Cathedral of St. Vibiana in the

city of Los Angeles county of Los Angeles state of California in the United States of America according to the rites of the Roman Catholic Church to her present husband the said Gerald Purcell FitzGerald who was then and now is domiciled in Ireland:

That your subject and the said Gerald Purcell FitzGerald lived and cohabited together as husband and wife after the [fol. 65] said marriage at Duarte Los Angeles aforesaid at Uniontown aforesaid at the Island Waterford aforesaid at No. 1 Oakwood Court Kensington in the county of London at the Carlton Hotel Pall Mall in the said county of London and at the Crown Hotel New Forest in the county of Hants and elsewhere from the date of said marriage until the month of June 1904:

That there has been issue of the said marriage three children all of whom are still living namely three sons John Purcell FitzGerald born on or about the 23rd day of September 1899 and Edward Maurice Purcell FitzGerald and Gerald Purcell FitzGerald (twins) born on or about the 24th day of October 1900:

That your subject's husband the said Gerald Purcell FitzGerald has treated your subject with great cruelty has used threats towards her and has frequently assaulted her:

That in or about the month of January 1900 the said Gerald Purcell FitzGerald at Duarte California became violent and abusive and your subject tried in consequence to run from the room to the baby's room for safety. The said Gerald Purcell FitzGerald ran after and stopped your subject and said "If you go in there I will go in and take the child and beat it to death" and "If I strike you (meaning your subject) while I am in this mood I will kill you" and that he then forced your subject back again into the room from which she had fled:

That in or about the month of March 1902 the said Gerald Purcell FitzGerald at Duarte threatened to kill your subject:

[fol. 66] That in or about the month of March 1902 the said Gerald Purcell FitzGerald at Duarte aforesaid dragged your subject out of bed into the middle of the room till in consequence of your subject's cries a lady come to her help and the said Gerald Purcell FitzGerald let her go:

That in May 1903 the said Gerald Purcell FitzGerald at the Van Nuys Hotel Los Angeles seized and shook your

subject most violently until her hat fell off and her hair fell down:

That in or about October 1903 the said Gerald Purcell FitzGerald at Clarehaven Newmarket kicked your subject out of bed to the floor:

That in or about the month of February 1904 at the Island Waterford Ireland the said Gerald Purcell FitzGerald locked your subject in his room for over two hours and accused your subject of trying to poison him and when he unlocked the door your subject fled from the room into the nursery but the said Gerald Purcell FitzGerald followed and threatened to break open the door and on your subject opening the door was dragged violently by the said Gerald Purcell FitzGerald from the nursery back into his said room:

That in or about the month of June 1904 at No. 1 Oakwood Court Kensington aforesaid the said Gerald Purcell FitzGerald seized your subject by her arms pinching and hurting her and marking the flesh:

That on the 17th day of June 1904 at the Great Western Railway Hotel Paddington in the County of London the said [fol. 67] Gerald Purcell FitzGerald committed adultery with a woman whom he took with him to the said hotel:

That on the 16th day of February 1906 your subject filed a petition in the King's Bench Division (Matrimonial of the High Court of Justice in Ireland and issued a citation against the said Gerald Purcell FitzGerald and at the hearing of the said petition on the 5th day of December 1906 the Right Honorable Lord O'Brien Lord Chief Justice of Ireland by his judgment found that the said Gerald Purcell FitzGerald was guilty of adultery and cruelty and he accordingly pronounced a degree of divorce and separation from bed board and mutual cohabitation with costs against the said Gerald Purcell FitzGerald:

That the said Gerald Purcell FitzGerald has by his cruelty and adulterous and criminal conduct precluded every possibility of reconciliation and dissolved the bonds of matrimony on his part and deprived your subject of the comforts of matrimony unless the said marriage be declared void and annulled by the authority of Parliament:

May it therefore please your Majesty (out of Your Majesty's goodness and compassion to your subject's misfortune and calamity) that it may be enacted and be it

enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:

Short Title

1. This act may be cited for all purposes as FitzGerald's Divorce act 1907.

[fol. 68] Marriage Declared Void and Lida Eleanor Purcell FitzGerald Enabled to Marry Again

2. The bond of matrimony between the said Lida Eleanor Purcell Fitzgerald and Gerald Purcell Fitzgerald her husband being violated and broken by the manifest and open adultery of the said Gerald Purcell FitzGerald and by his cruelty to the said Lida Eleanor Purcell FitzGerald shall be and the same is hereby from henceforth wholly dissolved annulled vacated and made void to all intents constructions and purposes whatsoever and it shall be lawful for the said Lida Eleanor Purcell FitzGerald at any time or times hereafter to contract matrimony and to marry as well in the lifetime of the said Gerald Purcell FitzGerald as after his decease with any man or men whom she might lawfully marry in case the said Gerald Purcell FitzGerald was actually dead and every such future marriage or marriages when duly had and celebrated shall be good and lawful and shall be so deemed and adjudged and taken in all countries and to all intents constructions and purposes whatsoever and every child born in such matrimony shall be deemed and adjudged and taken to be born in lawful wedlock and shall be legitimate and inheritable to and shall inherit any honors manors messuages lands tenements and hereditaments from by or through his or her parents' ancestors and relations and shall and my derive have and transmit titles to any real or personal estates and enjoy all other privileges as if the marriage of the said Lida Eleanor Purcell FitzGerald of which such child shall be the issue had been solemnized after the decease of the said Gerald Purcell Fitzgerald.

[fol. 69] Lida Eleanor Purcell FitzGerald to be Entitled to Rights in Property of Future Husband

3. The said Lida Eleanor Purcell Fitzgerald shall (unless barred by jointure or otherwise) be entitled to dower free

bench and thirds of the estate of such husband or husbands as she shall hereafter marry whereof he or they shall be seized or entitled as fully as if the said Gerald Purcell FitzGerald had died before the marriage of the said Lida Eleanor Purcell FitzGerald with such future husband and such future husband or husbands as she shall so marry shall be entitled to be tenant by the courtesy of the manors messuages lands tenements and hereditaments of the said Lida Eleanor Purcell Fitzgerald as fully as if the said Gerald Purcell FitzGerald had died before the marriage of the said Lida Eleanor Purcell FitzGerald with such husband or husbands.

Gerald Purcell FitzGerald Excluded from Rights in or to Property of Lida Eleanor Purcell FitzGerald and in or to Property of Said Lida Eleanor Purcell FitzGerald Hereafter Required.

4. That the said Gerald Purcell Fitzgerald and all persons claiming under or to claim by from or under him is are and shall forever be barred and excluded of and from all rights titles claims and interests of in to or out of lands tenements and estates real personal and mixed and all ornaments of the person and wearing apparel and all goods chattels and personal estate and effects whatsoever which the said Lida Eleanor Purcell FitzGerald now enjoys or is entitled to in possession in her own right or which she shall at any time hereafter acquire become seized or possessed of or entitled to by descent gift devise purchase or otherwise howsoever during the estate and interest of her the said Lida Eleanor Purcell FitzGerald her heirs executors administrators and assigns therein respectively and the said Lida [fol. 70] Eleanor Purcell FitzGerald her heirs executors administrators and assigns shall have hold and enjoy the same during her and their estate and interest therein for her and their own proper use and benefit exclusively of the said Gerald Purcell FitzGerald his heirs executors administrators and all and every other person or persons whomsoever claiming or to claim by from or under him.

EXHIBIT 2 TO ANSWER

This Indenture made the fourth day of March One thousand nine hundred and seven Between Gerald Purcell Fitz-

gerald of the Island, Waterford in Ireland (hereinafter referred to as "The Husband") of the one part and Lida Eleanor Purcell FitzGerald wife of the said Gerald Purcell FitzGerald (hereinafter referred to as "the Wife") of the other part.

The Husband and Wife hereby mutually covenant and agree with one another.

(a) That the Wife (except as to three consecutive months in each year upon the demand of the Husband) shall have the custody control and maintenance of the three children of their marriage and the Husband agrees not to oppose their removal beyond the jurisdiction of the Courts of Great Britain or Ireland during nine months in any year.

(b) Upon the death of the wife the custody control and maintenance of the said three children shall revert to the husband.

(c) The Husband agrees that during the three months in which he may claim the Society and Companionship of [fol. 71] the said children in any year they or either of them may be accompanied by a Nurse, Governess, Tutor or Servant appointed by the Wife the Husband to give the wife at least two months notice in each year of the particular three months of that year during which he desires their custody.

(d) The Wife shall have the right to the society and companionship of the three children during the nine months of any year but she agrees that they shall be sent to a Boarding School in England to be agreed by the Husband and Wife from the time when they reach the age of ten years except as to the child Gerald who need not go to a Boarding School before eleven years and that while they are at school she will not remove them therefrom nor claim that more than half of the vacation or holiday enjoyed by the children shall be spent with her.

(e) The Wife undertakes not to retain the children in residence in London during the months in which fog is prevalent or likely to prevail.

In Witness whereof the parties have hereunto set their hands and seals the day and year first in these presence written.

(Signed) Lida Eleanor Purcell FitzGerald. (L. S.)

Signed Sealed and Delivered by the above named Lida Eleanor Purcell FitzGerald in the presence of J. M. McDonnell, Solicitor, 32, Great George Street, Westminster, S. W.

[fol. 72] In Court of Common Pleas of Fayette County

Separate Answer of Charles E. Lenhart, Trustee—Filed December 6, 1910

Charles E. Lenhart, one of the defendants, saving all manner of exception to the inadequacy, insufficiency and manifold inconsistencies of the Bill of the plaintiffs, makes answer thereto as one of the trustees of the trusts described in the Bill, as follows:

I

I neither admit nor deny the allegations of the first paragraph of the Bill, as I have no certain knowledge of the facts therein alleged.

II

I admit the statements contained in the second paragraph of the Bill.

III

I admit that William McClelland was appointed guardian ad litem as stated in the third paragraph of the Bill, but I deny the regularity and validity of said appointment.

IV

I deny that Gerald Purcell FitzGerald owns the real estate described in the Bill, as alleged in paragraph fourth of the Bill, and aver that he owns but the undivided nine-tenths thereof, and that the other one-tenth thereof is owned by me in my own right and not as trustee in fee simple. The other statements of said paragraph four I admit.

[fol. 73]

V

I admit the statements of paragraph fifth of the Bill.

VI

I admit the facts set forth in paragraph sixth of the Bill.

VII

I admit the allegations of the seventh paragraph of the Bill.

VIII

I admit that the statements of the eighth paragraph of the Bill are correct so far as I have knowledge of the same.

IX

I admit that the facts set forth in the ninth paragraph of the Bill are substantially correct.

X

I admit that the Shamrock Supply Company is a partnership operating a general merchandising store as stated in paragraph tenth of the Bill; and I also admit that the average annual gross and net earnings of said company for the last five years, including good and bad years, have been approximately as stated in said paragraph.

XI

I admit that the average annual net profits of said Fayette Coke Company for the last five years, including good and bad years, have been approximately as stated in the eleventh paragraph of the Bill. I confine my answer in this and the preceding paragraph to the last five years for the reason that the coking plant of said company was enlarged about [fol. 74] five years ago, and prior to that time the average profits were less than as stated in the Bill. The other allegations of said paragraph I neither admit nor deny, being advised that I am not required to answer the same.

XII

I deny that the profits of the Fayette Coke Company and the Shamrock Supply Company were distributed by me as manager of said companies, as stated in paragraph twelfth of the Bill; and I also deny that the payment due the trustees June 30, 1910, was withheld by me as manager of said properties, as set forth in last said paragraph of the Bill. But to the contrary thereof, I aver that said profits were distributed by me as one of the owners of said properties, and as agent of my co-partner and co-owner, Gerald Purcel

FitzGerald; and that said payment was withheld by me as agent of said FitzGerald in compliance with the specific and positive direction of my said principal.

I deny that up to June 30, 1910, the trustees had received, pursuant to the terms of the aforesaid agreement, the sum of $39,990, on account of the fund of $300,000, directed to be accumulated by them, as alleged in said twelfth paragraph of the Bill, and aver that the amount so received by said trustees up to said date was but $34,368.27, in all, of which sum $1,773.76, thereof was accrued interest.

I admit the remaining allegations of said twelfth paragraph of the Bill.

[fol. 75] XIII

I am advised that I am not required to answer the allegations of the thirteenth paragraph of the Bill and I therefore neither affirm nor deny the same.

XIV

Answering paragraph fourteenth of the Bill, I deny, as alleged in said paragraph, that I have unquestioningly obeyed the direction of the defendant FitzGerald to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906. I also deny that I have wholly failed and neglected to perform my duties as trustee since the aforesaid direction of the defendant FitzGerald, and that I have neglected and refused to exercise any independent judgment in the premises, and that I am entirely subject to the domination and control of the defendant FitzGerald, as alleged in said paragraph.

As a further answer to said paragraph I aver that all sums due and payable to said trustees under said agreement of December 6, 1906, up to December 30, 1909, were duly accounted for and paid over to said trustees by me as the personal agent of the defendant FitzGerald, and out of his nine-tenths interest in the profits of the properties aforesaid, and by his specific authority and direction so to do.

That prior to June 30, 1910, I was notified by the defendant Fitz-Gerald, through his attorney and counselor at law,

not to make the payment to said trustees which would be due June 30, 1910, by the terms of said agreement of December 6, 1906.

[fol. 76] That it is specifically provided by the third paragraph of said agreement of December 6, 1906, that the payments to the trustees shall be made by the defendant FitzGerald out of the balance of his nine-tenths share of the profits arising out of said two companies, to wit; the Fayette Coke Company and the Shamrock Supply Company. That said agreement does not give me, either as general manager of said companies, or as one of the trustees or otherwise, any power or authority to take or appropriate any part of the nine-tenths share of the defendant FitzGerald in the profits of said two companies, and pay the same over to the trustees appointed by said agreement.

That after I was deprived of the right and authority as agent of said FitzGerald to make any further payments to the said trustees out of said FitzGerald's nine-tenths of the profits of said two companies, by his positive direction not to do so, as stated above, I was advised by counsel that I could not make such payments without incurring a personal liability to said FitzGerald for the sum or sums so paid; and this notwithstanding I was one of the trustees, for said agreement of December 6, 1906, by which I was appointed trustee, gave me no authority as trustee to make such appropriation and payment.

I was appointed trustee under said agreement of December 6, 1906, by the plaintiff, Josiah V. Thompson. My situation and business relations and connections with the defendant FitzGerald were practically the same then as now, and this was fully understood by the Plaintiffs Thomp-

[fol. 77] son and Lida Eleanor Purcell FitzGerald. I have no personal objection to being relieved of my duties as a trustee, but I deny that my personal interests are antagonistic to my duties as a trustee, or that I have failed to perform my duties as a trustee.

XV

I deny that this Honorable Court has any jurisdiction, or any legal or equitable power or authority to establish a lien upon my individual one-tenth interest in the properties known as the Fayette Coke Company and the Shamrock Supply Company, for the benefit of the beneficiaries under

the aforesaid agreement of December 6, 1906, to secure the payment of the sums by said agreement provided to be paid, as prayed for by the plaintiffs in paragraph second of their prayer for relief.

XVI

I deny that I have the power or authority in law or in fact to account for, or that I am legally or equitably required to pay over to the trustees now in office, or to other trustees, sequestrator or receiver that may be appointed, the proportion of the profits of the Fayette Coke Company and the Shamrock Supply Company provided by the aforesaid agreement of December 6, 1906, to be paid to the trustees, except as to such of said profits as have already come into my hands as trustee under said agreement as stated in paragraph twelve hereof, or that may hereafter come into my hands as such trustee. And I deny that this Court has any jurisdiction, or any legal or equitable power or authority to direct me so to account and pay over as [fol. 78] prayed for in paragraph four of plaintiffs' prayer for relief, except as aforesaid.

XVII

I deny that the nine-tenths of the profits of the Fayette Coke Company and the Shamrock Supply Company for the nine months ending September 30, 1910, or any part thereof, are now or ever have been in my hands and control as trustee, as aforesaid; and I deny that I have the power in fact or in law, or that I am legally or equitably required to pay over the same or any part thereof to a sequestrator or receiver or trustees, as prayed for in paragraph five of plaintiffs' prayer for relief.

XVIII

I deny that this Honorable Court has any jurisdiction, or any legal or equitable power or authority to restrain me from alienating or encumbering my individual one-tenth interest in the properties of the Fayette Coke Company or the Shamrock Supply Company, as prayed for by plaintiffs in paragraph sixth of their prayer for relief.

I therefore pray the Court:

I

That I be hence dismissed with costs.

Charles E. Lenhart.

[fol. 79] *Duly sworn to by Charles E. Lenhart. Jurat omitted in printing.*

In Court of Common Pleas of Fayette County

Adjudication—Opinion, Findings of Fact, Conclusions of Law and Decree

Opinion of the Court

The Requests for Findings of Fact and Conclusions of Law submitted to the Court by the parties in this case are sufficiently exhaustive and comprehensive that, with our answers thereto, we feel that we might properly omit further discussion and base thereon the decree we propose making and we would be glad to follow such course but under some of the dicta, amounting almost to requests or directions of our Appellate Courts in such matters and in view of the importance of the questions involved, we deem it our duty to set forth a chronological, connected Statement of Facts and give reasons a little more in detail and extenso for the faith we maintain, at least, in answering the following important legal questions, viz:

[fol. 80] I. Is the answer of the defendant, Mr. Fitzgerald, responsive to the Bill so as to bring it within the rule, requiring the plaintiff to overcome it by the testimony of at least two witnesses or one witness and corroborating circumstances?

II. Is the agreement of December 6, 1906, void, invalid and not enforceable as being collusive and against public policy?

III. If the said agreement of December 6, 1906, is good and valid does it create a lien, equitable or otherwise, on the property of the said defendant, Mr. Fitzgerald, from the operation of which it is specifically provided the funds in question are to be derived?

IV. The defendant, Mr. Fitzgerald, averring and insisting that the said agreement of December 6, 1906, is void and invalid, repudiating the trust and refusing to execute and perform his covenants, if the Court find and conclude that the said agreement is good and valid, should the said defendant, Mr. Fitzgerald, be removed as one of the Trustees and his place declared vacant?

We have been materially aided by the brief of plaintiffs' counsel; defendants' counsel refused to submit anything but their Requests and their oral argument on the motion to dismiss plaintiffs' bill.

Finding of Facts

March 1, 1899, at the Cathedral of St. Vibiana, in the city of Los Angeles, in the State of California, U. S. A., Lida Eleanor Niccols of Uniontown, Pa., was married to Gerald Purcell FitzGerald, a citizen of Ireland and a sub-
[fol. 81] ject of the King of Great Britain, residing temporarily in the said United States.

From this union was issue three children, viz: John Purcell Fitzgerald, born the latter part of 1899, and Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, twins, born October 24, 1900.

During the first year of their married life domestic differences and difficulties of a more or less serious nature between them began to appear and continued growing more serious as time passed; Mr. Fitzgerald accusing his wife of adultery and other matters and Mrs. Fitzgerald accusing her husband of adultery, cruelty and other grave misconduct. Matters progressed in such manner—bad becoming worse—until they separated in 1904, and some time thereafter Mrs. Fitzgerald instituted, in the proper Court of England, a proceeding for divorce;

"Mr. Fitzgerald challenged the jurisdiction of the English Court upon the ground that he was a domiciled Irishman and it being a matrimonial matter the English Court had no jurisdiction to entertain the claim."

Which contention was sustained by the English Court and the proceeding dismissed.

Immediately or soon thereafter, to wit: on February 16, 1906, Mr. Fitzgerald instituted a proceeding in His Majesty's High Court of Justice in Ireland, King's Bench

Division (Matrimonial) against Mrs. Fitzgerald for divorce on the ground of adultery, and on February 21, 1906, Mrs. Fitzgerald instituted in the same Court a proceeding against Mr. Fitzgerald for divorce on the ground of adultery, cruelty and other indignities.

[fol. 82] These cases were prosecuted in such manner that they both came on for trial before the Right Honorable Lord O'Brien, Lord Chief Justice of Ireland, and a City Special Jury on December 5, 1906, when and where both parties were represented by quite an array of eminent counsel. When the jury were empanelled and before they were sworn, Mr. Sergeant Dodd addressing the Court, (Pl'ffs' Ex. 4) said:

"My Lord, in this case, in which a petition has been presented by Mr. Fitzgerald I appear with my friends Mr. Healy and Mr. Rosenthal as counsel for the petitioner, and before you proceed to have the jury sworn, I desire to state that I have considered the matters submitted to me in support of the petition of Mr. Fitzgerald. I have I think, read every document and the details of the evidence which it was suggested might be given in proof, and I have arrived at the clear conclusion that it is my duty as leading counsel for Mr. Fitzgerald, acting upon my own responsibility but with the full approval of my colleagues, Mr. Healy and Mr. Rosenthal and with the concurrence of my client to state that I have decided to offer no evidence in support of the petition. Of course that means that a decree may be given against Mr. Fitzgerald in this suit."

Such an order was accordingly made dismissing the petition of Mr. Fitzgerald, with costs.

On the other case, that of Mrs. Fitzgerald against her husband, the said Sergeant Dodd of counsel for the re-
[fol. 83] spondent in that case, addressing the Court before the jury were sworn, said inter alia, as follows, viz:

"There are several allegations in this petition, which, if the entire case was fought out might give rise to bitter controversy as to the character and conduct of persons who are not before the Court, and as to the personal honour of Mr. Fitzgerald. If it is necessary that these matters should be proceeded with, it would be my duty to fight the case to the end. But even though the decision of the Jury and your Lordship might be adverse to the petitioner as to

these matters, I am of opinion upon the instructions submitted to me, that there is enough left of the case of the petitioner to entitle her to the decree she claims.

"Mr. Fitzgerald is not in a position to rebut some of the allegations of cruelty charged against him, and he admits that on the 17th of June, 1904, he was guilty of the offense charged, though not with the lady whose name has been erroneously mentioned in the petition. On these matters being proved or admitted—they are in fact admitted, for I am instructed to admit them—whatever the decision of the Jury as to the other allegations in the petition might be, the lady would be entitled to succeed and to obtain the relief she claims in her petition. Under these circumstances it would be deplorable to have a bitter and acrimonious struggle in relation to matter not material to the issue, and if the counsel for Mrs. Fitzgerald are satisfied with our admissions on these issues I will not resist the [fol. 84] case any further. I wish to say again that I adopt this course upon my own responsibility, but again I have the full approval of my colleagues, and the concurrence of my Client and his Solicitor."

In view of which Mr. Campbell, K. C., of counsel for Mrs. Fitzgerald, addressing the Court, said, inter alia:

"I feel myself placed my Lord, in a somewhat difficult position owing to the course that has been taken by my learned friend Sergeant Dodd. I think your Lordship will give me credit for not being anxious to prolong ill will. I would be the last person in the world I hope to wish to enter into matters in this painful case that were unnecessary to enable my client to obtain the relief to which she is entitled."

Whereupon by reason of the novel situation counsel for Mrs. Fitzgerald requested and the Court granted a half hours adjournment for conference and consideration; after which the jury were sworn and the case proceeded with in the regular orderly way; after the statement or opening by counsel, witnesses were called, testimony and proofs submitted, clearly establishing the claims of the libellant on the question of adultery and cruelty on the part of Mr. Fitzgerald, and after a fair, clear and impartial charge by the Court to the jury, cautioning them particularly as to their duty on bona fides and mala fides in such cases,

"the jury retired and after an absence of about a quarter of an hour, returned into Court, with a verdict that the husband had been guilty of cruelty and adultery. On these [fol. 85] findings, His Lordship pronounced a decree for divorce a mensa et thoro, with costs against the respondent."

The pleadings and proofs in this case in either England or this jurisdiction would have been sufficient to have entitled the libellant to a divorce a vinculo matrimonii but no power to grant such divorce is vested in the Courts of Ireland, and Irish subjects can be divorced absolutely only by special Act of Parliament.

The said Mr. and Mrs. Fitzgerald executed an agreement under date of December 6, 1906, by the terms of which, inter alia, it was necessary to select and appoint Trustee or Trustees and the Trustees mutually selected by the said parties were the said Gerald Purcell Fitzgerald, and Josiah V. Thompson and Charles E. Lenhart, the two latter being residents of Fayette County, Pa., and it was signed by all the said Trustees as evidencing their willingness to accept and undertake the trust as per the terms of the said agreement.

It was admitted by all parties in interest that after the aforesaid decree in divorce a mensa et thoro Mrs. Fitzgerald was entitled to a reasonable alimony, in keeping with the circumstances and financial ability of her husband, and she was likewise yet vested with her rights in dower of and in his extensive and valuable realty. While both parties seem to have been anxious to have an absolute divorce and the said agreement touches on that subject to the extent of fixing certain necessary dates, yet we are satisfied and find as a fact that the primary and principal purposes were to [fol. 86] settle and adjust the matter of permanent alimony and secure to Mr. Fitzgerald a waiver of the said dower rights of his wife and make provisions for the maintenance and future comfort of their children, and the material provisions of the said agreement in these particulars and those relevant to this proceeding are, in substance, as follows, viz:

I. He was to pay his wife alimony at the rate of 3000£ per annum from December 5, 1906, until the passage of the Act of Parliament dissolving the said marriage, in the meantime the wife to make no application to the Court for alimony.

II. From the date of the Act of Parliament dissolving the said marriage the husband to pay to the Trustees so much of his share of the profits accruing annually from the Fayette Coke Company and the Shamrock Supply Company as will yield an annuity of $15,000 per annum for three years and after three years so much as will yield an annuity of $20,000, to be collected from the said companies and paid to the wife by and through the Trustees for and during the term of her natural life.

III. The husband also to pay to the Trustees out of the balance of his nine-tenths share of the profits from the said two companies, from the passing of the said Act of Parliament, one-third of his said share to be invested by them until a total sum of $300,000 has accumulated; one-half of the income of this fund to be paid by the Trustees to the wife and the other half is either to be allowed to accumulate [fol. 87] or to be expended for the benefit of the children, in the discretion of the Trustees.

IV. "In consideration of the benefits to be obtained by the foregoing provisions in her favor the wife hereby agrees that in the event of the act of divorce becoming law that any right she may have to dower, alimony or otherwise under the laws of any of the United States of America or of Great Britain or Ireland shall be extinguished by and merged in this agreement, the execution whereof by her shall be deemed and taken to be a waiver by her of all such rights to all intents and purposes as affecting the property of the husband."

V. The husband covenants and agrees with the Trustees that he will not encumber nor alien nor suffer to be encumbered or aliened any portion of his interest in the said properties until the said fund of $300,000 has been accumulated.

VI. In case of vacancy in the board of Trustees the remaining two may fill it and in case they neglect or fail to do so it may on petition be filled by the Court of Common Pleas of Fayette County, Pa.; the husband agrees not to challenge or controvert the fact that his wife enjoys the status of a citizen of the State of Pennsylvania, U. S. A.

VII. The other provisions of the said agreement are regarding the custody, etc., of the children, disposition of the fund in case of death of parties or when children become of age, settlement of disputes as to meaning of provisions

[fol. 88] and other matters not material or relevant to the issues involved in this controversy.

Some time after the date of the above mentioned agreement, a bill known as "Fitzgerald's Divorce Act, 1907", was introduced into the British Parliament "to dissolve the marriage of Lida Eleanor Purcell Fitzgerald with Gerald Purcell Fitzgerald, her present husband, and to enable her to marry again and for other purposes."

The record of the proceedings in the House of Lords (Plff's' Ex. 2A) shows that there was submitted to Parliament for its consideration, not only the decree in divorce a mensa et thoro and Judgment of the High Court of Justice of Ireland hereinbefore mentioned, but also eminent counsel representing both the petitioner and the respondent, and agents representing both the parties, appeared and submitted substantially the same statements and proofs as were produced on the aforesaid trial in the said High Court of Justice in Ireland; and the matter was so proceeded in that on July 26, 1907, it was, inter alia, enacted by the British Parliament as follows, viz:

"The bond of matrimony between the said Lida Eleanor Purcell Fitzgerald and Gerald Purcell Fitzgerald her husband being violated and broken by the manifest and open adultery of the said Gerald Purcell Fitzgerald and by his cruelty to the said Lida Eleanor Purcell Fitzgerald shall be and the same is hereby from henceforth wholly dissolved [fol. 89] annualled vacated and made void to all intents constructions and purposes whatsoever.

It is further enacted that

"It shall be lawful for the said Lida Eleanor Purcell Fitzgerald at any time or times hereafter to contract matrimony and to marry as well in the lifetime of the said Gerald Purcell Fitzgerald as after his decease with any man or men whom she might lawfully marry in case the said Gerald Purcell Fitzgerald was actually dead."

Notwithstanding there is no such provision in the said enactment regarding the right of the said Gerald Purcell Fitzgerald to remarry, yet it is a fact that five days after the date of the aforesaid enactment, viz: July 31st, 1907—he did remarry and of that union one child has been born.

As to the aforesaid agreement, all the parties thereto in interest accepted and performed their respective parts and

duties from the date thereof henceforth until June, 1910; pursuant to the provisions of said agreement the profits arising from the operation of the said two companies were, until the last named date, distributed according to the terms of the said agreement, a proper proportion thereof having been regularly paid to said Trustees for the benefit of said Lida Eleanor Purcell Fitzgerald and another portion (amounting in June 1910 to over $34,000) paid to said Trustees toward the accumulation of the $300,000 fund aforesaid.

June 23, 1910, the above named Trustees were advised and given notice in writing by the man in charge of the [fol. 90] operation and management of said two companies and business manager of Mr. Fitzgerald, as follows, viz:

"You are hereby notified that G. P. Fitzgerald has instructed me, as his business manager, not to pay to the Trustees, Alimony or to Childrens' Fund, amounts due June 30th, 1910."

Accordingly the said amounts were not paid nor, so far as appears in this proceeding, have any other or further amounts since that date been paid to the said Trustees nor to any other person for or on account of the said funds provided for in the said agreement. It being insisted that the said Mr. Fitzgerald repudiated the said agreement and declared the same not binding on him, that he refused as one of the Trustees to receive or pay over any part of the said trust funds and prevented further execution of said trusts.

In view of which facts and conditions this proceeding was instituted and a bill of complaint filed setting forth sufficient of the situation and of the foregoing facts to give this Court, sitting in Equity, jurisdiction; the prayer for relief is rather lengthy, consisting of seven paragraphs, but it can be condensed and the material substance of it expressed in one word, viz: "performance."

So far as the important and material averments of the said bill are concerned, the answer of the defendant, Mr. Fitzgerald, not only does not seriously question or deny them but in substance and effect, if not in direct language, practically admits their verity and for his defense avers that the said agreement is illegal, null, void and invalid as [fol. 91] being collusive and against public policy, in view of the circumstances surrounding it and under which it was

secured and executed, as set forth in his answer, as follows, viz:

"On the 16th day of February, 1906, I then being a British subject domiciled in Ireland, did file in His Majesty's High Court of Justice in Ireland, King's Bench Division (Matrimonial) a petition praying said Court to decree a divorce a mensa et thoro from my then wife, the said plaintiff, Lida Eleanor Purcell Fitzgerald, wherein I did charge my said wife with adultery. On the 21st day of February, 1906, my said wife, Lida Eleanor Purcell Fitzgerald, did file in the said High Court of Justice her petition against me, wherein she prayed for a divorce a mensa et thoro, and in which petition she did charge me with the offences of adultery and cruelty. The said causes were proceeded with and Bills of Particulars were filed by each of us in our said suits under orders of the said Court, setting forth the particulars of said offences so charged. During the said litigation, to wit: on or about the 3rd day of September, 1906, my said wife and I did agree as follows:

"That I would withdraw my petition for divorce against her, and that I would not contest her petition for divorce, but would admit the said charges of adultery and cruelty and facilitate her in procuring said divorce a mensa et thoro in said Irish Court, and that upon procuring such decree, as absolute divorces are not granted under Irish law, she would proceed to apply for and secure an Act of [fol. 92] Parliament, declaring an absolute divorce from the bonds of matrimony between her and me. In compliance with and pursuance of said agreement, I did on the 5th day of December, 1906, withdraw my said action for divorce and the charges therein against my wife, and did not contest my said wife's petition for divorce, and did make the admissions heretofore referred to. In consequence thereof, on the said 5th day of December, 1906, my said wife obtained a decree of said Court divorcing her a mensa et thoro. On the succeeding day, to wit: December 6, 1906, in further pursuance of said agreement heretofore referred to, and in consideration of the said acts on her part and my part heretofore referred to, the contract or agreement set forth in plaintiff's Bill, and which is the foundation of these proceedings, was entered into between her and me, the further consideration for said agreement on her part being, as set forth therein, the procurement

by my said wife of an Act of Parliament divorcing her and me. I particularly call the attention of the Court to the second clause of said agreement, as set forth in plaintiffs' Bill, wherein the said consideration is set forth in the following language:

(a) "2. As and from the date of the passing of the Act of Parliament dissolving the marriage of the husband and wife, and in consideration of the premises, the husband will pay to the Trustees in trust, &c."

[fol. 93] and I call the attention of the Court to the third paragraph of the said agreement or contract, wherein the consideration for the same is again set forth in the following language:

(b) "3. For the consideration aforesaid the husband will also pay to the Trustees out of the balance of his nine-tenths (9/10's) share of the profits arising out of the two companies named above, to be paid to and collected by the Trustees from time to time, from the passing of the said Act of Parliament in manner as follows, to wit:"

and I call the attention of the Court to clause 11 of the said contract or agreement, wherein it is provided as follows:

(c) "11. It is hereby agreed by and between the husband and the wife that the following provisions relating to their children shall take effect from the time of the passing of the said Act of Parliament, &c."

Conclusions of Law

I.

In the language of Mr. Justice Sharswood in Eaton's Appeal, 66 Pa. 483,

"The first and most important question in the cause is, whether this answer is responsive to the bill, and entitled therefore to the weight assigned to it by the well settled rule of evidence in equity, that an answer responsive to the bill can only be overcome by the testimony of two wit[fol. 94]nesses, or of one witness corroborated by circumstances elsewhere in evidence."

So far as this case is concerned we are clearly of opinion that the above question is not difficult of determination

and may be solved by direct quotations of principles enunciated by our Supreme Court.

"When an answer contains facts not responsive to any interrogatory in the bill, it is not an answer for the defendant; but the facts, if material, must be established by independent proof." Eberly v. Groff, 21 Pa. 251.

"A denial or averment in an answer to a bill in equity not directly responsive to the bill, is not evidence for the defendant." Coleman v. Ross, 46 Pa. 180.

"The plaintiff in her bill complained of the erection by her adjoiner of a party wall with openings. The defendant in his answer averred that he did it by license of a former owner of plaintiff's lot. Held, that this was not responsive to the bill, but was an affirmative allegation in avoidance of the plaintiff's demand, which should be established by independent testimony." Vollmer's Appeal, 61 Pa. 118.

In the last named case would it have changed the situation, so far as the rule in question is concerned, if the defendant had, in his answer, averred that he erected such wall even by the license of the plaintiff in that case, the then owner of the said lot? We think not, and in our opinion that brings the case at bar almost on an exact parity with the principles as expressed in Vollmer's Appeal.

[fol. 95] "Where the allegations of the bill are that the parties entered into a written agreement and that defendant violated the same and defendant answers that she has the right so to do by virtue of a parol agreement entered into at the same time, such answer is not responsive and the burden of proving the parol agreement is upon the defendant." Kenney's Appeal (Pa.) 12 Atl. 589.

"The seventh objection is that the answer of the defendant is wholly uncontradicted by the evidence, and must be taken as admitted. It is enough for this that the replication puts in issue the averments of the answer, and throws upon the defendants the burden of sustaining them." Catherwood's Appeal, 52 Pa. 154.

"When the plaintiff calls upon the defendant to answer the allegations contained in the bill, he makes him his witness for that purpose only, but for no other. Whatever constitutes in truth a part of the facts stated in the bill,

the defendant has a right, and indeed is bound to set out. But he cannot make himself a witness for himself generally, and introduce other facts either in avoidance or defense. It is considered indeed as a test whether, as a witness on examination, he could be cross examined as to the matter which he states in anticipation of his defense on a trial at law." Eaton's Appeal, supra.

In the same case Mr. Justice Sharswood in referring to "an able and exhaustive opinion by Chief Justice Parker", of N. H., on the subject, says:

[fol. 96] "He declares the true distinction to be between allegations upon those subjects upon which the bill requires an answer, and allegations of new matter not stated or inquired of in the bill, but introduced by the defendant in his defense. Whether the plaintiff calls upon the defendant to make an answer which must directly deny or affirm some statement, or whether he requires him to make a statement of the facts upon the particular subject matter, the principle is the same."

In paragraph eight of Plaintiffs' Bill in this case they allege the making of the agreement of December 6, 1906, and set it out in full; a responsive answer to that averrment would be either to admit or deny the execution of such contract, and in the eighth paragraph of his answer the defendant, Mr. Fitzgerald, admits such execution and that the copy set out is a correct one and then undertakes to make himself a witness, by his answer under the aforesaid rule, to testify as to the unlawfulness of the consideration, to avoid becoming the actor in setting up and proving what he claims to be a void or invalid contract, for the purpose, doubtless, of avoiding the rule in Irvin v. Irvin, 169 Pa. 529.

The plaintiffs charge a violation by the defendant, Mr. Fitzgerald, of the contract and a refusal to abide by and carry out its provisions, which he admits, averring that he has wholly repudiated the contract. In our opinion his reasons for so doing are not in response to any allegation in the bill but are matters set up by way of justification [fol. 97] and thus clearly become matters in avoidance which the law requires he should prove.

Suppose the plaintiffs were suing at law on this agreement to recover money due under its terms, would they be

required to prove the consideration—the instrument is under seal and the consideration is fully stated in it and it is not a bond, bill or note containing a money consideration; would it not be sufficient for the plaintiffs to prove and offer the contract and establish the amount due and rest their case and if the defendant undertook to defend on the ground of either an illegal contract or unlawful consideration would he not be compelled to become the actor, and, under the rule in Irvin v. Irvin, supra, would such evidence be admissible?

In view of the foregoing we are clearly of opinion that the answer of Mr. Fitzgerald is not responsive to the bill to the extent claimed, nor so as to require the testimony of two witnesses or one witness and other corroborating circumstances to overcome it and we are satisfied that we did not commit error in refusing to dismiss the plaintiffs' bill on the application of defendant at the close of the plaintiffs' case.

II.

It is urged and insisted on the part of the defendant, Mr. Fitzgerald, as a matter of law, that we must conclude from what appears in and on the face of the agreement of December 6, 1906, particularly the parts quoted supra from his answer, that it is void and invalid as being collusive and against public policy.

[fol. 98] What is Collusion?

In general, it is where two persons apparently in hostile positions and having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court.

In divorce law, Bouvier says collusion is "an agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury."

"Collusion implies a concerted or agreed purpose to commit a fraud or accomplish a wrong." Wallace v. Jones, 107 N. Y. Sup. 288.

"Collusion is a corrupt combining of married parties to procure a sentence of judicial order by some false practice, as for one of them to appear to or in fact do what would

otherwise be ground for divorce, or in any way to deceive the Court in a cause, thus seeking its interposition as for a real injury." Pohlman v. Pohlman (N. J.), 46 Atl. 658.

"The term 'conclusion' as used in divorce suits is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the Court would not grant." Doeme v. Doeme, 89 N. Y. Sup. 215.

What do we mean by Public Policy?

"Public policy means public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, [fol. 99] which any citizen ought to feel, is against public policy." Goodyear v. Brown, 155 Pa. 514.

When the decree a mensa et thoro was secured in the Courts of Ireland Mrs. Fitzgerald's right to permanent alimony in an amount commensurate with her station in life and the financial ability of her husband was absolute, full and complete, the only unsettled question in connection therewith was the determination of the amount by the Court, unless it were adjusted otherwise.

How could it be either collusive or against public policy for the parties, instead of requiring the Court to do so, to amicably and mutually adjust such matter, and what difference whether under the name of alimony or otherwise, and wherein does or can such adjustment violate or infringe on the principles as expressed above?

Further, there appears to us no reason why, on principle, such a contract as the agreement of December 6, 1906, which, under all the circumstances, we think, is fair, equitable and reasonable on its face, should be considered as collusive or against public policy as matter of law; even though it were executed pending an application or a contemplated application for an absolute divorce by Act of Parliament, particularly in view of the fact that the parties had previously been divorced a mensa et thoro by the Courts of Ireland on grounds that would in this state or England have entitled the plaintiff, Mrs. Fitzgerald, to an absolute divorce; which condition made the matter of secur-

ing a divorce in Parliament largely a matter of form, as in [fol. 100] Westropp's Divorce Bill, 11 Appeal Cases, 294, the House of Lords decided that whatever would be sufficient ground for a divorce under the Matrimonial Causes Act of 1857, which was limited in operation to England and Wales, would entitle the petitioner, if a citizen of Ireland, to a divorce by Act of Parliament,

Lord Herschell said:

"Whatever may have been the case prior to the passage of the Divorce Act of 1857, I think that since the passage of that Act whatever would justify a divorce and afford a legal ground for it according to the provisions of that Act, where that Act prevails, would afford sufficient ground for an application to the Legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate."

Because of the marriage relation the husband was bound to support his wife. The compensation which she was to receive under the contract was in the place of the support which the defendant was bound to provide while the marriage relation continued and which he was none the less bound to provide when, owing to his fault, it was lawfully dissolved. This legal obligation constituted a part of the basis for the settlement of their affairs and for the making of this agreement by which it was definitely determined how much he should contribute for the future support and comfort of his wife and children.

The propriety of the divorce is a matter entirely different from and should not be confused with the amount of ali- [fol. 101] mony. Can it be assumed that parties who agree on the amount of alimony, in case of divorce, thereby necessarily agree to procure a divorce by fraud or collusion? The reason permanent alimony is in such cases generally made to depend upon the granting of a decree, is because only then does the right to it come into existence. If the divorce is secured the right to permanent alimony arises and is simultaneously extinguished by the prior settlement; if denied, there is nothing upon which the settlement can act.

Contracts fairly entered into by persons able and willing to do so should not be declared void for illegality unless the opposition between the law and the contract is so violent

that the Court feel a clear and strong conviction of their incompatibility.

In Printing Company v. Samson, 19 Eq. Case, L. R. 462, Sir George Jessell said:

"If there is one thing more which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of Justice."

The same principle is expressed by Chief Judge Andrews in Diamond Match Co. v. Roeber, 106 N. Y. 482, as follows:

"Indeed what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interest of society favor the utmost freedom of contract within [fol. 102] the law and require that business transactions should not be trammeled by unnecessary restrictions."

In view of the serious consequences to Mrs. Fitzgerald and her children of declaring void the contract of December 6, 1906, we feel that we should not do so only on the solemn conviction that the interests of society imperiously demand it. Then, bearing in mind the paramount rule of public policy that the freedom to contract should not be unnecessarily circumscribed, wherein is the said agreement collusive or against public policy?

If we confine ourselves to the terms of the agreement we shall not find an illegal purpose without doing violence to the plain expressions of the parties. Suppose it were conditioned on the passing of an Act of Parliament divorcing the parties, can it for that reason be said that Mrs. Fitzgerald would acquire any advantage by the passage of that Act? By the terms of the agreement the Act of Parliament which secured to her certain benefits extinguished certain valuable rights—dower and alimony. In view of their circumstances in life and of Mr. Fitzgerald's financial ability and of the rights surrendered by Mrs. Fitzgerald, can it be decided as a matter of law that the benefits secured by Mrs. Fitzgerald were so disproportionate to the rights surrendered by her as to raise a conclusive presumption of collusion? Certainly not.

Public policy requires the enforcement of no such rule, on the contrary it discountenances unnecessary litigation and favors the adjustment of controversies out of court.

[fol. 103] The law in England regarding such matters has been settled for centuries. The practice requiring a husband to make provision for his wife prevailed even where the husband was the complainant and the wife was the guilty party. At first this practice took the form of an unofficial inquiry instituted generally by some designated member of the Divorce Committee in the House of Commons, who required the husband to give bond for the support of his wife in case the application for divorce then pending in Parliament should become law.

Ultimately this practice became so well established and recognized that a functionary was officially appointed by Parliament to protect the interests of the wife by requiring the husband to make provision for her by private settlement, conditioned upon the passing of the Bill of Divorce. This functionary came to be known in later times as "The Lady's Friend."

Under the English law the validity of such agreement is beyond question and it was urged in such cases that the amount should be settled by the parties themselves and this was usually done, "but when a difference arose, a member of the House of Commons, having heard both sides by their agents, fixed the amount, and saw that it was settled on the wife by a private deed" or bond: Macqueen, in his work on the Law of Marriage and Divorce, 2d edition, referring to the form of bond ordinarily required, says, at page 147:

"But Parliament, or rather the lower House, made it ultimately a positive rule in all cases to impose this humiliating burden; and the Commons had a functionary ap- [fol. 104] pointed to watch the delinquent wife's interest and make stipulations for her. The performance of this duty was an object of ambition in the House. The Senator chosen for the post was designated "The lady's friend".

The following is the form of bond which was ordinarily insisted upon by "The Lady's Friend":

"Know all men by these presents, that I, ——, am held and firmly bound to ——, his executors, administrators and assigns, in the sum of ——, to be paid to the said ——, his executors, administrators or assigns, for which payment to be well and truly made I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated this fourteenth day of July, one thou-

and eight hundred and fifty-seven, and in the twenty-first ear of the reign of Queen Victoria.

Whereas *a bill is now pending in Parliament* to dissolve he marriage of the above bounden —— with his present ife, ——, and for other purposes. Now the condition of he above written bond or obligation is such, that if the said —— do and shall well and truly pay or cause to be paid o the said ——, during the life of the said ——, his now ife, one annuity or yearly sum of ——, by equal half early payments, on the — day of ——, and the — day of ——, in every year, with a proportionate part thereof up fol. 105] to the day of the decease of the said ——, the rst half yearly payment thereof to be made on the — day f —— next ensuing the date of the above written bond; *r if the said recited bill shall not come into law, then the bove written bond or obligation to be void, otherwise to e and remain in full force and virtue.*

Signed, sealed and delivered, &c."

Clifford in the History of Private Bill Legislation refer- ing to the same practice, says, at page 414, vol. 1:

"This rule was enforced privately but effectively. In he House of Commons there was functionary called 'The adies' Friend,' an office generally filled by some member nterested in the private business of Parliament who under- ook to see that any husband petitioning for a divorce made uitable provisions for his wife.

No clause to this effect was inserted in the Bill lest it hould be rejected in the other House, *but as a condition f obtaining relief, a husband was made to understand that, efore the Bill passed through Committee, he must enter nto a bond securing some moderate income to his wife.*"

In Tyrell's Divorce Bill the House of Lords refused to rant the husband's Bill for divorce unless provision were nade for the wife, and for that reason postponed the Bill n order to allow such a private arrangement to be made. The proceedings in this case are outlined in said Clifford's listory, page 413:

fol. 106] "But there were cases in which the House of ords felt that injustice would be done if, the marriage ettlement being torn up, a wife was deprived of all interest n the fortune she had brought into settlement. In 1829

they expressed an opinion that, as the wife had brought 45,000£ to her husband, he ought to make some provision for her support. Counsel for the husband replied that, while he would do all that a gentleman ought to do, he felt indisposed to support her in adultery. Thereupon the Bill was postponed, but, an arrangement being made, was afterwards passed."

In Lewelyn's Divorce Bill, Sess. 1851, the husband since the separation from his wife had become entitled in her right to the sum of 200£. Application that the husband should be directed to pay this sum refused, it being understood that matters of this sort were made the subject of private arrangement between the parties.

The same question is considered in Pritchard on Divorce, page 15, where the following note by Col. Wilson Patten, M. P., late Chairman of the Divorce Committee of the House of Commons, is set forth:

"The exact amount of the sum was regulated in some measure by the circumstances of the husband, as well as by those of the case itself; but in all instances the allowance was as small as was consistent with the main object in view. The practice being generally known by the agents usually employed to conduct Divorce Bills through Parliament, *the* [fol. 107] *parties usually settled the amount themselves, but when a difference arose, a member of the House of Commons, having heard both sides by their agents, fixed the amount, and saw that it was settled on the wife by a private deed before the bill passed its last stage in the House of Commons.*

"I have always understood that the practice arose in the last century out of the following state of things: The House of Lords always declined to pass a Divorce Bill in which alimony was allowed to the wife. The House of Commons insisted, for the reasons given above, that it ought to be allowed, and at length it persisted in its opinion, to the rejection of all Divorce Bills for several sessions. The difficulty was at last got over, on the suggestion, I believe of Lord Howick, afterwards Earl Gray, that previous to the passing of any Divorce Bill through the Commons proof should be given that a settlement had been made on the wife by means of a private deed, and a member was always

thereafter appointed, whose duty it was to see that this was done."

It will be observed that none of these authorities contains any suggestion that an agreement of this kind, made in contemplation of a Legislative divorce, can for that reason be regarded as collusive or against public policy.

This view is further supported by practical considerations of the highest importance.

It is, we think well settled, and we do not understand it to be disputed that the wife has no claim for alimony after [fol. 108] the granting of a Legislative divorce, for the reason that the marital relation is thereafter completely destroyed, so if her rights in that regard are protected it must be done previous to the date of the Act.

It is also well settled in this country that the Act divorcing the parties cannot provide for the payment of alimony, for this would be an exercise of judicial and not of Legislative power.

Crane v. Meginnis, Gill & J. (Md.) 463;
Gaines v. Gaines, 9 B. Monroe (Ky.) 295;
Maguire v. Maguire, 7 Dana. (Ky.) 184;
Townsend v. Griffin, 4 Harr (Del.) 440.

If, therefore, as defendant insists, parties cannot lawfully contract with one another with respect to alimony prior to the granting of a Legislative divorce, and if the Act dissolving the marriage may not provide for it, and since subsequent to the passage of the Act the wife has no right to alimony from her former husband, then it follows that she is without remedy whenever the marriage is dissolved by Legislative act.

By statutory enactment in this state the rights of the wife to alimony—even in cases where she was the guilty party—have been jealously guarded.

Act of Feb. 26, 1817, Sec. I, 6 Sm. 405,
Act of April 15, 1845, P. L. 455,
Act of April 11, 1862, P. L. 430,
Act of June 25, 1895, P. L. 308.

Courts in this jurisdiction have recognized and enforced agreements of separation between husband and wife which provide for the husband paying the wife certain sums, and [fol. 109] later when divorce proceedings were instituted the

Courts held such agreements binding and that the husband should pay the amount provided in the agreement as or in the place of alimony.

Bloom v. Bloom, 17 C. C. R. 478;
Shepherd v. Shepherd, 18 C. C. R. 614.

For reasons hereinbefore and expressed in hereafter citations, the tendency in American jurisdictions, we think, is in the direction of relaxing the rigor of the doctrine that contracts in settlement of alimony during the pendency of proceedings for divorce are void, and are coming to be made dependent largely on the special circumstances attending each particular case.

In Storey v. Storey, 125 Ill. 608, it was held that, although a husband and wife could not enter into an agreement for divorce yet the amount of alimony and the terms of payment might be arranged between them by consent. Said the Court, at page 610:

"While it is true that a husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay the wife, and the terms of the payment and the length of time during such payment is to continue, may be arranged beween them by consent."

In Snow v. Gould, 74 Me. 540, it was held that an agreement between parties for a divorce, declaring the terms upon which a divorce might be decreed, does not necessarily show connivance or collusion. Where no fraud is intended to be thereby practiced upon the Court and no facts are sup- [fol. 110] pressed such an agreement may be entirely unobjectionable. The Court says, at page 544:

"An agreement of divorce is not necessarily collusion or connivance. It depends upon whether it is an attempt to obtain a divorce not justified by the real facts; whether it is intended to practice fraud upon the Court. Mr. Bishop deduces from the authorities this rule upon the subject: 'An agreement between the parties, not involving an imposition upon the court or a suppression of facts, to facilitate the proofs and smooth the asperities of the litigation, is, although liable to be looked into by the court, not collusion or otherwise objectionable. It may be meritorious.' 2

Bishop, Marriage and Divorce, 6th Ed. Sec. 28. Our own Court has said as much."

Burnett v. Page, 62 Me. 122;
Badger v. Hatch, 71 Me. 562.

In Parsons v. Parsons, 62 S. W. 719, it was held that an agreement which provided for the division of the husband's property and further stipulated that "if either of said parties shall hereinafter institute divorce proceedings against the other or further prosecute the divorce suit above named it shall not vary the property rights of either of said parties", relieved the husband from the obligation to pay alimony and was not objectionable as collusive. Referring to this provisions the Court said:

"There is no proof of fraud in the execution of the contract. Such agreements, when fairly made, contravene no public policy, and are not void. * * * There is nothing in [fol. 111] the record to impeach this contract and it is conclusive on the parties."

To the same effect is the opinion of the Court in Collier v. Collier, 66 Ill. 484, where a note given in satisfaction of all claims of alimony was sought to be impeached as collusive. Mr. Justice Waterman, delivering the opinion of the Court, said:

"The question presented in this case is whether a note upon which judgment was recovered against the plaintiff in error was given in settlement of a valid claim for alimony which the defendant in error had against him. While a husband and wife may not enter into an agreement for divorce yet the amount of alimony the husband is to pay the wife, the terms of payment and the length of time payment is to be made may be arranged between them by consent. Buck v. Buck, 60 Ill. 241; Storey v. Storey, 125 Ill. 608. The question of whether the note in suit was given for alimony and not for an agreement to permit a divorce was fairly submitted to the jury upon conflicting evidence, which fully warranted the jury in arriving at the conclusion it did."

In Julier v. Julier, 62 Ohio, 90, the Court said:

"The parties in the case before us were competent under the statute to contract with each other and there is no reason

why in agreeing upon the amount that should be paid the wife in money they might not stipulate for the release of the interest of either in the property of the other."

In Burnett v. Paine, 62 Me. 122, it was decided that notes given by a libelee to a libellant during the pendency of pro- [fol. 112] ceedings for divorce were valid in the absence of evidence tending to prove collusion. The entire opinion of the Court, delivered by Peters, J., is as follows:

"It does not appear that the notes in suit were given to the plaintiff's intestate as a consideration for her procuring a divorce from the defendant, nor that her deed was given to him to induce him not to defend against her libel. The case seems to amount to this: The libellant having a cause for divorce the libelee desired to defend against it only so far as the claim for alimony was concerned. The claim was adjusted by the parties upon terms to be carried into effect provided a divorce was decreed. We can see no impropriety in their doing so. The same thing is often done under the eye of the Court. Such questions may well be left for settlement with the parties interested, where they can agree. Of Course, the Court may exercise a supervision of such adjustment, so far as to see that no wrong is perpetrated whenever there seems to be a necessity for its interposition."

In Dutton v. Dutton, 30 Ind. 452, an agreement by the parties pending a suit for divorce was upheld, which provided that certain property should be received in settlement of all claims for alimony in case a divorce should be decreed. The Court refused to charge as follows:

"That a parol agreement made between husband and wife in view of separation and fully executed on the part of the [fol. 113] husband, wholly for a consideration which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable, and just, the contract will be upheld."

The Appellate Court, reversing the decision of the Court below said:

"We think the instructions asked fairly stated the law and should have been given. * * * When such agreements are fairly made and are reasonable and proper they will be upheld in equity."

In Martin v. Martin, 65 Iowa, 255, the Court discussing a case similar to the one at bar, said:

"Defendant alleged, in one division of his answer that before the commencement of the suit he and plaintiff by mutual consent and agreement separated and that they then entered into a written contract by which plaintiff agreed in consideration of the conveyance by him to her of certain real estate and the delivery to her of certain personal property and the payment to her of certain money that in her action of divorce she would make no claim for alimony either temporary or permanent and that she would release him from all liability for the support of their minor child. Plaintiff demurred to this devision of the answer on the ground that the alleged contract was illegal and void. The Circuit Court overruled the demurrer and this ruling is assigned as error. * * * It was held in Blake v. Blake, 7 Iowa, 46, that the capacity of the parties to contract with each other were so enlarged by the statutes of this state, as [fol. 114] that a contract of this character, if it was supported by a just and adequate consideration and was untainted by fraud or circumvention or improper influence, would be enforced, and this holding was adhered to in subsequent cases."

In Chaplin v. Chaplin, 135 Mass. 393, it was held that an action might be maintained on a promissory note given to a woman by her former husband pursuant to an agreement entered into pending divorce proceedings, in settlement of all her claims for alimony.

In Calame v. Calame, 25 N. J. Eq. 548, it was held that an agreement made by a husband with his wife, to give her certain property in lieu of all her claims for alimony and conditioned upon a divorce being granted, would be enforced in equity. Said the Court:

"I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but, when it appears that the separation of the wife, forming the ground work of this agreement, was justifiable and the provision is suitable, to this extent it is, in my judgment, safe to say that the contract should be upheld."

In King v. Mollohan, 61 Kan. 683, it was decided that an agreement would not be treated as invalid because there

was, at the time of its execution, an understanding between the parties that an early divorce should be obtained. Said the Court, at page 69:

[fol. 115] "Under the circumstances we think there was no collusion or fraudulent purpose in making the agreement, and that the action of the parties did not contravene public policy."

In Gibbons v. Gibbons, 54 S. W. 719 (Ky.), it was held that, where a husband sued for a divorce on the ground of five years' separation, his agreement to pay the wife a certain sum per month in consideration of her agreement not to delay the decree of divorce by interposing a claim for alimony was not void as against public policy. The Court said:

"Do these averments of the petition show a contract based upon immoral consideration? We think not. Looking alone to the allegations of the appellee's purpose in making the offer 'of speedily procuring a divorce and adjusting the question of alimony' and the statement that she accepted his offer and 'filed no pleas in his suit against her for divorce' it might reasonably be contended that the contract was based upon the consideration claimed by the appellee. But notwithstanding the maxim fortius contra proferentem, a fair construction must be placed upon the whole petition and the language used must not in order to sustain a demurrer be wrested from its reasonable import in the connection in which it is used. Appellant begins by averring in unmistakable language the existence of the ground for divorce (five years' separation) which absolutely entitled the appellee to a decree; that he brought suit upon that ground, and for the purpose of speedily procuring a divorce [fol. 116] and adjusting the question of alimony, he made the agreement sued on. Those averments taken as true upon the demurrer show the appellee to have been entitled to a divorce. Nothing stood in the way of the obtention of a judgment except the taking of proof as to the separation which could not be agreed to but was required to be proven whether denied or not and the adjustment of the wife's claim for alimony, should she make one. Such a claim would almost inevitably postpone the decree of divorce until the alimony should be adjusted. The petition, therefore, shows the appellee's offer to have been made not for the purpose

of securing a divorce but for the purpose of adjusting the wife's claim for alimony, for that, according to her statement in the petition, was the only claim she could truthfully have set up."

We believe the case at bar is distinguishable from all the above cited cases by reason of the fact that the decree of divorce a mensa et thoro had already been secured and that the wife's right to permanent alimony had consequently attached before the contract was made.

Permanent alimony is alimony allowed after the trial and is measured according to the husband's ability, the social standing of the parties and the needs of the wife and children.

Keezer on Marriage and Divorce, 278, page 151;
Sparhawk v. Sparhawk, 120 Mass. 390;
Westmeath v. Westmeath, 3 Knapp, 42;
[fol. 117] Cooke v. Cooke, 2 Prill Ecc. 40;
Charles v. Charles, 15 L. T. N. S. 416.

This fact is recited in the agreement and her right to make application to the court for alimony is expressly relinquished in consideration of the stipulated payments to be made partly in lieu thereof. It differs from cases in which the agreement has been executed prior to the granting of the divorce for the reason that the right to permanent alimony in such cases had not come into existence at the time the contract was made. Here the right to such alimony was perfect and this right was merged by mutual consent in the contract.

Nor can it be said that by the agreement her position was changed to her advantage, for while she doubtless secured valuable rights she surrendered rights of great value —dower and alimony, in a large estate. The rights which she surrendered were positive, the rights which she secured were uncertain and limited to the amount stated in the agreement and might fall far short of it or dwindle to nothing at all, depending on the profits incident to the operation of the Fayette Coke Company and the Shamrock Supply Company.

In view of the English law, even if the agreement of December 6, 1906, were made and entered into in contemplation of the Act of Parliament divorcing the parties absolutely can it, under the circumstances of this case, for that reason be held to be collusive and against public policy?

We should remember that the parties at the time of the execution of this contract were domiciled in Ireland, where the power to grant divorces a vinculo matrimonii has been [fol. 118] absolutely withheld by Parliament from the courts, their authority being limited to the granting of divorces a mensa et thoro.

What are the fundamental principles upon which legislative divorces are granted and sustained?

Legislative divorces are not subject to the ordinary rules governing actions for divorce. They depend upon the sovereign will of the lawmaking power, and their validity is in no way impaired by the fact that no cause for divorce is shown to exist.

As was said by Mr. Justice Field in Maynard v. Hill, 125 U. S. 190:

"If within the competency of the Legislative Assembly of the Territory, we cannot inquire into its motives in passing the Act granting the divorce; its will was a sufficient reason for its action. * * *

The facts alleged in the bill of complaint that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the Act. Knowledge or ignorance of parties of intended legislation does not affect its validity if within the competency of the Legislature."

In Cabell v. Cabell, 58 Ky. 319, the Court says, at page 329:

"Now to what extent the public may be benefited, or how far the legislature may have regarded the public good promoted by the act in question, is an inquiry we need not pursue. It is enough to know that the body in the exercise of its wisdom and discretion, enacted the law, and the pre-[fol. 119] sumption exists that they were satisfied that to some extent it had or would have that effect; and where an act of the legislature is not interdicted by the fundamental law of the land, it is not for this department of the government to say that there was no necessity for the enactment, or that it was not promotive to some extent of the public good."

The granting of such divorces is an exercise of legislative, as distinguished from judicial power, upon a subject prop-

erly within legislative control. The proceedings of that body are governed by different principles and bear not even the semblance of a judicial inquiry. It may proceed without notice, and if it gives heed to the inclinations of the parties it is a matter of favor and not of right. It may decree a dissolution of the marriage with or without cause and with the consent or in spite of the dissent of both parties; but this is a matter solely of public policy to be determined by the legislature with reference to how far such legislative act will affect favorably or unfavorably the welfare of the state.

The power to grant divorces by legislative act is a peculiar attribute of sovereignty which has been exercised in this country from the earliest times and the validity of such divorces has been sustained in the absence of constitutional limitations. Says Cooley in his treatise on Constitutional Limitations, page 110:

"The granting of divorces from the bonds of matrimony was not confined to the courts in England, and from the earliest days the Colonial and State legislatures in this [fol. 120] country have assumed to possess the same power over the subject which was possessed by the Parliament and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases."

Says Kent in his Commentaries, Vol. 2, page 97:

"During the period of our Colonial government for more than 100 years preceding the Revolution, no divorce took place in the Colony of New York, and for many years after New York became an independent State there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the Legislature."

In Croniss v. Croniss, 54 Pa. 255, the Supreme Court of Pennsylvania say:

"Special divorce laws are legislative acts. This power has been exercised from the earliest period by the Legislature of the Province and by that of the State under the Constitutions of 1776 and 1790. The Constitution of 1790 was framed in view of this practice. The continued exercise of the power after the adoption of the Constitution of 1790, cannot be accounted for, except on the ground that all men,

learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. Communis error facit jus would be sufficient to support it, but it stands upon the higher ground of contemporaneous [fol. 121] and continued construction by the people, of their own instrument."

See also
Maynard v. Hill, 125 U. S. 190;
Jones v. Jones, 12 Pa. 350;
Roberts v. Roberts, 54 Pa. 265;
Crane v. Meginnis, 1 G. & J. (Md.) 463;
Stone v. Pease, 8 Conn. 541.

In our judgment the rule that Courts of Justice should discountenance collusive contracts made in contemplation of divorce has no application to a case like the present, where the plaintiff and defendant were in no sense parties to the Act of Parliament divorcing them, but were merely the subject matter of the Act. Every question of fact, every point of law, had been determined in the proceedings for divorce a mensa et thoro which had been previously obtained, and which in Pennsylvania would have been cause for absolute divorce.

Suppose, however, that the agreement contemplated and required the co-operation of both parties in securing the Act of Parliament, how could that in any respect, under the facts in this case, affect the issues? What though both parties had united in petitioning Parliament for this divorce and what though this agreement had expressly contemplated and provided such a course? The policy of the law in discountenancing collusive divorces and agreements intended to have that effect is to prevent an imposition on the law, which grants divorces only for specified causes, by parties masquerading in a court of justice as ostensibly opposed but [fol. 122] actually united in interest. The reasons which prevail in such cases cease to apply where the relief sought does not involve inquiries of a judicial nature based upon issues of law and fact, to be determined upon evidence produced by the parties themselves, but depend upon the exercise of the sovereign power of the legislature.

Then, there being nothing obnoxious in the granting of a legislative divorce by consent or upon application of both

parties, how can an agreement contemplating such a course for that reason be treated as collusive? Every argument to the contrary rests upon a failure to distinguish between a judicial and a legislative act; and it is well settled that a dissolution of marriage may be by either.

Bishop, "Marriage and Divorce", Sec. 787, says:

"There would, therefore, upon principle, seem to be no reason why the granting of a divorce should not be either a legislative or a judicial act; legislative when performed as a mere exercise of sound discretion * * * judicial, when divorce is demanded as a right under established laws, in consequence of some breach of duty committed by the offending party."

"It is the province of the Courts to determine the questions of fact of the particular case, and to apply to these facts certain rules of law established by legislative authority. If agreements contemplating collusive divorces are void, it is because the legislature, cognizant of the dangers with which they are fraught, has expressly or impliedly declared them [fol. 123] to be so. It is because the public occupies somewhat the position of an interested third party. In this case, both parties appearing by counsel and agents, Parliament, by adding the public consent to that of the parties, consummated their actual will.

The decision of the Court in Cabell v. Cabell, 58 Ky. 319, goes far in supporting the above proposition. In that case it was held that a legislative divorce granted, without cause, but with consent and upon application of both parties, was a proper exercise of legislative power. It was further decided that the wife, who had assented to the decree and had accepted the benefits of a contract made in contemplation thereof, would not subsequently be heard to question its validity: the facts appear in the opinion of the Court:

"In 1838, Samuel Cabell and Louisa Montgomery were married in Green County, in this state, and continued to live together as man and wife until some time in 1839, when, by mutual agreement, they separated.

"By the terms of the separation the property which the wife owned before marriage was to be returned to her, and

in addition thereto she was to be furnished with a riding horse and the sum of one thousand dollars, for the payment of which her husband executed to her two friends, Wakefield and Hoskins, his note, for her use and benefit. It was further agreed, and an instrument in writing to that effect executed by the parties, that either one or both might apply to the legislature of Kentucky for a divorce, and that such [fol. 124] divorce might be granted without making provision for the support of the wife, she having been (as is recited in the paper) provided for by her husband in a manner 'satisfactory to her and her friends.'

"At the same time Wakefield and Hoskins, who seem to have acted in the matter as the relatives and friends of the wife, covenanted in her behalf and with her assent with the husband that she should assert no claim for dower against his estate at his death, and that they would be answerable to his representatives for any such claim.

"In pursuance of this arrangement, Cabell restored to his wife the property she owned before marriage and paid for her use to her friends the one thousand dollars, which she received. He likewise, at the session of the general assembly 1840-41, presented a petition setting forth the foregoing facts, and obtained the enactment of the following law:

'Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the marriage contract now existing between Samuel J. Cabell and Louisa H. Cabell, be, and the same is hereby dissolved, and they are hereby restored to all the rights and privileges of unmarried persons.'

"It is obvious that the enactment was not 'for the benefit of one of the parties, in consequence of a breach of contract by the other.' It was procured with the assent of both, [fol. 125] for the benefit of both, and both acquiesced in it, for many years enjoying rights and privileges which they could not otherwise have been allowed. It does not appear that the act was in consequence of a breach of the contract; and no feature is presented which, under the rule quoted, would make the dissolution enacted by the legislature a judicial act. • • •

"The enactment in this case is made without reference to the breach of any existing contract or law; for it does not appear that either party had been guilty of a breach of conjugal or legal duty, or of any of the obligations of the marriage contract. On the contrary, as appears from the

facts stated, the separation was the voluntary act of both, not superinduced by maltreatment or misconduct of either; and its terms satisfactory, not only to both parties, but approved of by the friends and advisers of the wife. The divorce, or the special act complained of, was not procured against the will, or without the consent of the wife, but in accordance with her will and with her consent. Nor can it be said that she was deprived of her property without compensation, for she was compensated, and, as she then and subsequently admitted, in a manner entirely satisfactory to herself and friends. * * * As the agreed facts show, she received the property and money stipulated to be paid her, resumed her previous name, removed from the state, did business, and bought and sold real estate, and in every other respect enjoyed all the rights and privileges of a femme sole. * * *"

[fol. 126] In Adams v. Palmer, 51 Me. 480, it was held that there was nothing unconstitutional in the granting of divorces by legislative act; especially if granted with the consent of both parties. Appleton, C. J., said, at page 486:

"But, if this were more questionable than we deem it to be, it cannot be doubted that the status of parties may be changed by the Legislature, with their mutual consent; and such consent need not be express, but may be implied. In the case before us the consent of the parties may be inferred from the act itself and their subsequent conduct. The husband was to pay a certain sum, within a limited time, to the previously appointed trustee of the wife, for her benefit. This he did, and the wife, or her trustee, received the payment. She ceased to claim a continuance of her marital rights. Nay, more, she entered into new marital relations, and hence neither objected to, nor was she in condition to object to the new ties which her husband had formed with the defendant."

In Jones v. Jones, 12 Pa. 350, it was held that, in an action in which it was sought to impeach the validity of a legislative divorce, evidence was not admissible to show that the divorce had been obtained by fraud or falsehood, or that one of the members misrepresented the facts.

Coulter, J., said:

"But that what follows, in relation to the manner of proceeding, or agencies used by any member of the body, ought

[fol. 127] to be rejected. It would be unbecoming and discourteous to the legislative body to admit such evidence which is excluded by the case of Fletcher v. Peck, 6 Cranch. 87."

And in Roberts v. Roberts, 54 Pa. 267, the husband, pending proceedings instituted by the wife for divorce a mensa et thoro, procured a law divorcing them absolutely. The Court held that the divorcing act was evidence in the proceedings. It held further that there was no reason to suppose that the legislature had acted for the causes upon which the judicial divorce was sought to be secured. Agnew, Jr., delivering the opinion of the Court, said, at page 269:

"The exclusion from the evidence of the act of the Legislature divorcing these parties from the bonds of matrimony, requires a reversal of the judgment. This exclusion assumes that the cause of divorce fell wholly within the jurisdiction of the court, or that no ground whatever existed. • • • But it does not follow that the Legislature must have acted upon the grounds set forth in the libel and not upon those within the circle of its own powers."

It has been held in this country that the Act divorcing the parties cannot provide for the payment of alimony, as it is an exercise of judicial power.

Crane v. Meginnis, Gill & J. (Md.) 463;
Gaines v. Gaines, 9 B. Monroe (Ky). 295;
Maguire v. Maguire, 7 Dana (Ky.) 184;
Townsend v. Griffin, 4 Harr (Del.) 440.

[fol. 128] The wife, therefore, in such cases would be absolutely deprived of her right to alimony and support, unless agreements executed prior to such divorces are upheld.

Hence there being in this case, no attempt to obtain a divorce not justified by real facts; nothing to indicate any intention to practice fraud or imposition upon the Court or suppress facts; no proof of fraud in the execution of the contract and nothing in evidence to impeach it; nothing to indicate that the parties were not competent and willing to contract; nothing showing that any wrong was perpetrated; nothing showing that the contract was not proper, fair, reasonable and just; nothing showing that the consideration was immoral or that it was not just and adequate;

nothing showing that the contract was even tainted by fraud, circumvention or improper influence; nothing that tends clearly to injure the public morals; nothing tending to injure public confidence in the purity of the administration of the law; nothing tending to undermine that sense of security for individual rights which any citizen ought to feel, and, in our judgment, there being ample warrant and authority for the said parties, under the facts, conditions and circumstances surrounding the whole case to contract and agree as provided in the said agreement of December 6, 1906, and believing that right and justice are with the plaintiffs and that honesty and fair dealing demand that said contract should be sustained and performance decreed:

Therefore, having performed our duty as directed in Calame v. Calame, supra, where it is stated "The Court [fol. 129] should undoubtedly look into these arrangements and their surroundings", we conclude on this feature of the case, in the language of the Court in King v. Mollohan, supra, viz: "Under the circumstances we think that there was no collusion or fraudulent purpose in making the agreement, and that the action of the parties did not contravene public policy."

III

What are the legal principles by which the question of equitable liens is to be ascertained?

The doctrine stated in its most general form is, that every agreement whereby a party sufficiently indicates an intention to make some particular property or fund, properly identified, a security for a debt or other obligation, creates an equitable lien upon the property so indicated which is specifically enforceable against the property in equity. This doctrine is an application of the maxim "that equity regards as done that which ought to be done."

The application of this principle is carried still further and it is applied to property not yet in existence at the time the contract is made. Accordingly, it has been held that an agreement to assign or give security upon or to affect property not yet in esse or not yet in the possession of the promisor constitutes an equitable charge upon the specific property, which will be recognized and enforced against the property in equity. The intent to give security being clear, equity will treat the instrument as an executory contract for that purpose.

[fol. 130] Story, in Equity Jurisprudence, Sec. 1040, says:

"Courts of Equity will support assignments, not only of choses in action, and of contingent interest and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility, not, indeed, as a present, positive transfer, operative in presenti, for that can only be of a thing in esse but as a present contract, to take effect and attach as the thing comes in esse. Thus, for example the assignment of the head matter and whale oil to be caught in a whale voyage now in progress will be valid in equity and will attach to the head matter and oil when obtained."

In Walker v. Brown, 165 U. S. 654, the court held the following contract, embodied in a letter, to create an equitable lien against the property therein designated:

"We beg to advise you that the loan of $15,000 Memphis bonds, made by me for the use of Messrs. Loyd and Company, of Ellensburg, is with the understanding that any indebtedness that they may be owing to you at any time, shall be paid before the return to me of these bonds or the value thereof, and that these bonds or the value thereof are at the risk of the business of Loyd and Company, so far as any claim you may have against said Loyd and Company is concerned".

Mr. Justice White said:

"It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value [fol. 131] thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against the third persons who are volunteers or have notice."

"This language certainly designates the bonds or the value thereof as a security for the debt to Walker and Company. It says that the bonds belonging to Brown shall not be returned to him so long as the debt to Walker is unpaid. It thus provides for the keeping of the bonds in the hands of Loyd and Company until the debt of Walker is discharged. Having stipulated for retaining the bond as long

as Walker's debt existed, the agreement proceeds to dedicate the property thus retained exclusively to the payment of Walker's debt, for it says, not that the property so held that became the asset of the firm, not that it shall be liable to the general creditors of Loyd and Company, but that the bonds or the value thereof are to remain at the risk of the business of Loyd and Company so far as any claim that you, Walker and Company may have, * * * To dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien."

[fol. 132] Keezer, on "Marriage and Divorce", 312 and 313, says:

"In the absence of a Statute, a decree for alimony does not create a lien upon the husband's real estate, unless the decree is fastened upon a certain piece of property. It is a personal charge on the defendant and not on his estate.

"In granting alimony the Court may declare the decree to be a lien upon certain real estate of the defendant."

If the Court "may declare the decree to be a lien upon certain real estate", cannot the parties by contract do the same, if the purpose be clear that it is for or takes the place of alimony, whether done in the name of alimony or otherwise? Whether clearly so expressed or not if it "is fastened upon a certain piece of property" and it is clearly provided that the fund must be raised from such property, we find and conclude that it establishes an equitable lien on the same.

Considering, therefore, the rule in equity to be that a plain intention to dedicate certain property as security for certain purposes has the effect of creating upon the designated property, an equitable lien, it remains to apply this principle to the facts of this case.

Paragraph 2 of the agreement provides that:

"the husband will pay to the trustees in trust and for the uses and purposes hereinafter set forth *so much of his share of the profits accruing annually from and out of the properties* known as the Fayette Coke Company and the Shamrock [fol. 133] Supply Company situate at Shamrock near New Salem, Fayette County, Pennsylvania, United States of

America, as will yield an annuity of Fifteen Thousand Dollars per annum for three years and after three years so much of his share of the said profits therefrom as will yield an annuity of Twenty Thousand Dollars per annum, *the said annuity or annuities respectively to be collected from the said companies and paid to the wife by and through the trustees* in such lawful manner and at such times as they shall determined."

Paragraph 3 provides:

"And the husband for the consideration aforesaid covenants agrees to and with the Trustees that he will not encumber or alien or suffer to be encumbered or aliened any portion of his interest in said Fayette Coke Company and said Shamrock Supply Company without the consent of the Trustees until said fund of Three Hundred Thousand Dollars has been accumulated."

Does not this language indicate an intention on the part of the contracting parties to declare it to be a lien upon certain specified real estate and to give the plaintiff a specific equitable lien on the same?

Why is reference made to this particular fund if the stipulated payments were intended by the parties to be secured only by the personal credit of Mr. Fitzgerald? Why are they to be paid "from and out of the properties"; and why, [fol. 134] furthermore, are they "to be collected from the said companies and paid to the wife by and through the Trustees"? Why is it provided that the properties pledged to this purpose are not to be encumbered, if it were not intended by the agreement to create an equitable charge upon them? The only satisfactory answer to these questions is that the parties intended to pledge the property as security for the obligation.

There is, in the first place, a provision that a portion of the profits, not a sum equal to, but a part of the thing itself, shall be collected at stated periods for the use of Mrs. Fitzgerald by the Trustees and paid to her, and there is, in the second place, a provision against encumbering by the defendant designed to preserve intact the security dedicated to this purpose.

The case of Patten v. Wilson, 34 Pa. 299, is directly in point. It was there held that, an agreement between an attorney and his client that the former should have $100 for

his services "out of the verdict" operated as an equitable assignment to that extent of the sum recovered.

Woodward, Jr., said:

"Mr. Geyer had no lien on the fund attached, by virtue of the professional relation betwixt him and his client, but we think that under the facts disclosed in his testimony he had an equitable assignment. He wanted more than $100 for his services, but Wolf would agree to give no more, but that sum he agreed to give 'out of the verdict' if Geyer would try his cause. Geyer did try the cause, and as between himself and Wolf he acquired thus an equitable right [fol. 135] to receive the $100; Wolf would be estopped from demanding it in the face of his agreement."

To the same effect is the opinion of the Court in Chase v. Petroleum Bank, 66 Pa. 169, where it was held that an agreement by a depositor that his balances should be applied to the repayment of a debt incurred by the Bank at his request, operated as an equitable assignment of his balances to the obligation.

Williams, J., said:

"We are of the opinion that the facts found by the special verdict show an equitable appropriation of the balances of the deposit accounts in the bank, of which the defendant had the control, the payment of the money for which his note was given. The contract was not a more naked agreement that the funds should be applied to the payment of the debt previously contracted; but it was a contract under which the bank advanced the money, in consideration of the defendant's agreement that the funds should be appropriated to its payment."

In Spott's Estate, 156 Pa. 281, the material facts appear in the opinion of the Court by Mitchell, J.:

"Taking the facts as the auditor reports them, they show that Mrs. Spotts had an open account with Beetem & Company, on which she was a creditor for $661.50 and a debtor for $173.61, leaving a net credit to her of $487.89. G. S. Beetem, one of the firm of Beetem & Company, was at that [fol. 136] time endorser on her note for $450, and she desired him to assume the further liability of endorsing another note for $2,000. This he agreed to do, in consideration of her agreement that $450 of her credit should be offset by

the note for that amount, which he undertook that the firm should pay. This arrangement was carried out. Appellant endorsed the second note, and when the first note came due his firm paid it. This was in law an equitable assignment of so much of her claim to Beetem. The one party who could object to it was the firm, and they ratified it by payment of the note. It makes no difference that this payment was after her death. She received the consideration, the endorsement of the new note, and the assumption of the other, and neither she nor her creditors could avoid performance of her part of the bargain. Her credit in the mutual account was from that time reduced by that amount, and if she had sued upon her claim for bricks, during the running of the note, she could not have recovered more than the balance after giving the credit for $450."

We are therefore of opinion and conclude that the agreement of December 6, 1906, creates an equitable lien on the individual interest of the said Gerald Purcell Fitzgerald of and in the said Fayette Coke Company that will, subject to the provisions of the said agreement, be specifically enforced in equity.

[fol. 137] IV

Having determined the agreement of December 6, 1906, to be good and valid, should the defendant, Gerald Purcell Fitzgerald, be removed as a defaulting trustee in repudiating the said agreement and refusing to execute the trust?

Under the general obligation of carrying the trust into execution, trustees are bound to conform strictly to the direction of th trust. The trust itself, whatever it be, makes and limits the trustee's powers and furnishes the measure of his obligations. It is a principle in equity jurisprudence that a repudiation of the trust by a trustee or an attempt by him to challenge the validity of the trust instrument will furnish proper ground for the removal of such offending trustee.

The inherent jurisdiction of chancery over trustees and over fiduciary agencies is well established and has been long recognized.

In Irvine v. Dunham, 111 U. S. 327, the controversy arose as to the character of an instrument claimed by the cestui que trust to be a trust and by the trustee to be a mere

gratuity left in escrow. Mr. Justice Woods, said, at page 334:

"The appellant next contends that he is entitled, under the terms of the trust, to hold on to the stock, which he received as a consideration for the conveyance of the trust property, until there has been an accounting and the expenses and counsel fees have been paid. But by his answer he denies the trust, he claims to hold the stock for himself alone, he wants no accounting and does not offer to account, [fol. 138] or to hand over any net proceeds of the property after an accounting. In other words, he seeks to hold on to the trust property until it suits him to execute a trust, the existence of which he denies.

"Where there is a failure of suitable trustees to perform a trust, either from accident or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause, courts of equity will appoint new trustees. * * * No trustee can be more unsuitable than one who not only refuses to act, but denies the trust. When, therefore, appellant denied that he held in trust the stock claimed by the appellee, the latter, having established the trust, was entitled to have, if he demanded it, a new trustee appointed."

In Backhaus v. Backhaus, 70 Wis. 518, the Supreme Court sustained the judgment of the trial court in removing the defendant as trustee upon evidence which showed that "the defendant had, before this action was commenced, denied that he had money in his hands as a trustee or otherwise, for the use, benefit and support" of the beneficiary.

In Clark v. Wilson, 53 Miss. 119, it was held that if the trustee declines to execute the trust a court of chancery will remove him and appoint a new trustee:

"If the trustee dies, becomes unable or declines to sell, and no provision is made for a successor, the vacancy can only be filled by the chancery court which never permits the [fol. 139] trust to fail because the appointee of the grantor cannot or will not execute it."

A trustee may be removed when inharmonious relations between him and the cestui que trust have reached so acrimonious a condition as to make personal intercourse between them impossible.

In Price's Estate, 209 Pa. 210, the Court says:

"When inharmonious relations between the trustee and the cestui que trust, not altogether the fault of the former, will not generally be considered a sufficient cause for removal, yet where they have reached so acrimonious a condition as to make any personal intercourse impossible and to hinder the proper transaction of business between the parties, due regard for the interest of the estate and the rights of the cestui que trust must require a change of trustee."

And in Neafie's Estate, 199 Pa. 307, it is said that

"If his management of the trust justly subjects him to criticism and to a lack of confidence by the cestui que trust he should not be continued in the control of the estate."

The trustee may be removed though the conditions between him and the cestui que trust have not reached so serious a stage, if he be manifestly hostile to the cestui que trust, though his hostility be merely passive or if his conduct has been such as to justify dissastisfaction or suspicion.

[fol. 140] Potts' Petition, 1 Ashm. 340;
Kellberg's Appeal, 86 Pa. 129;
Bryson v. Wood, 187 Pa. 366.

In Hille's Estate, 14 Phila. 247, the fact that the trustee and the cestui que trust were engaged in adverse litigation over the trustee's account, was held to be proper ground for his removal as trustee.

In Teeter v. Veitch, 61 Atlantic, 14 (N. J.), the defendant was trustee to receive the title to certain property and to convey it to a corporation then in process of formation. The corporation was formed but the defendant refused to convey. The court held that the complainants could sue for the removal of defendant as trustee and to compel him to convey to them the property.

In view of which, under the facts of this case, we are of opinion and conclude that the said Gerald Purcell Fitzgerald should be removed as one of the Trustees and his place declared vacant.

DECREE

Now, March 3d, 1911, this cause came on to be heard at this term and was argued by counsel; and now, March 15th,

1911, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

I

That the defendant, Gerald Purcell FitzGerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell FitzGerald the sum of sixteen thousand four hundred and [fol. 141] sixty dollars ($16,460.00) and that the said Trustees pay the same to Lida Eleanor Purcell FitzGerald.

II

That the defendant, Gerald Purcell FitzGerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell FitzGerald and John Purcell Fitzgerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, minor children of the said defendant Gerald Purcell FitzGerald and of the said Lida Eleanor Purcell FitzGerald, the sum of five thousand three hundred and eighty-eight dollars ($5388.00), upon the trusts set forth in Paragraph Third of the agreement dated December 6, 1906, and set forth at large in the Bill filed herein.

III

That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title and interest of the defendant, Gerald Purcell FitzGerald, in and to the real property described in Paragraph Ninth of the Bill filed herein and known as the Fayette Coke Company property.

IV

That the defendant, Gerald Purcell FitzGerald, be and he is hereby removed from his office as Trustee of the trusts created by said agreement of December 6, 1906, and he is hereby directed to account for and pay over to Josiah V. Thompson and Charles E. Lenhart, Trustees of the trusts created by said agreement of December 6, 1906, and to the Trustee to be hereafter chosen by them, the said Thompson and Lenhart, or appointed by the Court, in place of the [fol. 142] said Gerald Purcell FitzGerald, all sums in his hand or for which he is accountable under said agreement of December 6, 1906.

V

That Richard W. Dawson, Esq. be and he is hereby appointed Referee to take and state the account of the said defendant Gerald Purcell FitzGerald as Trustee as aforesaid and report the same to the Court and upon final confirmation and said report that judgment be entered against the said Gerald Purcell FitzGerald for the amount found due on such accounting.

VI

That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell FitzGerald within ten days; in case they are unable to agree they shall report their disagreement to the Court forthwith at the expiration of said period of ten days.

VII

That the defendant, Gerald Purcell FitzGerald be and he is hereby restrained and enjoined from in anywise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company and in the property of the Shamrock Supply Company unless and until there shall first have been accumulated in the hands of the Trustees under the said agreement of December 6, 1906, the sum of Three Hundred Thousand Dollars as provided by Paragraph Third of said agreement.

[fol. 143] VIII

That the defendant, Gerald Purcell FitzGerald, pay the costs of this proceeding.

By the Court.

Attest: Wm. McClelland, Proth'y.

In Court of Common Pleas of Fayette County

Petition for Modification of Decree—Filed March 5, 1915

To the Honorable, the Judges of said Court:

The petition of Josiah V. Thompson, Charles E. Lenhart and William W. Parshall, trustees of the trust created by

Indenture bearing date the sixth day of December, A. D. 1906, between Gerald Purcell FitzGerald (therein referred to as "the Husband") of the first part; Lida Eleanor Purcell FitzGerald (therein referred to as "the Wife") of the second part, and Josiah V. Thompson, Charles E. Lenhart and Gerald Purcell FitzGerald (therein referred to as "The Trustees") of the third part, recorded in the Recorder's Office of Fayette County, Pennsylvania, on the first day of August, A. D. 1910 in Agreement Book Vol. 22 page 304 et seq., respectfully represents:

First. That by decree of your Honorable Court entered herein on March 15, 1911 the said Gerald Purcell FitzGerald was removed from his office as trustee and subsequently thereto the remaining trustees appointed William M. Thompson as trustee in his stead. and that William M. Thompson resigned as such trustee on or about January 1, [fol. 144] 1915, and your Honorable Court appointed William W. Parshall, one of your petitioners, as trustee in his stead on February 4, 1915, in accordance with the provisions of said Indenture.

Second. That paragraph 2 of said Indenture provided as follows:

"As from the date of the passing of the Act of Parliament finally dissolving the marriage of the Husband and Wife and in consideration of the premises the Husband will pay to the Trustees in trust for the uses and purposes hereinafter set forth so much of his share of the profits accruing annually from and out of the properties known as the Fayette Coke Company and the Shamrock Supply Company situate at Shamrock near New Salem Fayette County Pennsylvania United States of America as will yield an annuity of Fifteen Thousand Dollars per annum for three years and after three years so much of his share of the said profits therefrom as will yield an annuity of Twenty Thousand Dollars per annum the said annuity or annuities respectively to be collected from the said companies and paid to the wife by and through the Trustees in such lawful manner and at such times as they shall determine but not less often than in sums of Five Thousand Dollars on January 1st May 1st and September 1st for the first three years and Five Thousand Dollars on December 1st March 1st June 1st and September 1st of each year after the said three

years to be due and payable to the wife for and during the [fol. 145] term of her natural life."

Third. The Act of Parliament in said Indenture mentioned was passed on the twenty-sixth day of July 1907, so that the provisions of paragraph 2 of said Indenture providing for the payment of an annuity of Twenty Thousand Dollars annually became effective on or about the 26th day of July A. D. 1910. The said annuity has been fully paid to January 1, 1914, but the annuity for the year 1914 has not been fully paid, there being a deficit of $10,242.12.

Fourth. The decree of your Honorable Court heretofore made and entered herein on to-wit, the fifteenth day of March A. D. 1911, decreed, inter alia, as follows:

III

"That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title, and interest of the defendant, Gerald Purcell FitzGerald, in and to the real property described in Paragraph Ninth of the Bill filed herein and known as the Fayette Coke Company property."

That the interest of the said defendant in said real property therein referred to was the undivided nine-tenths and he remains seized thereof except such of the coal then underlying a part of said lands as has since been mined. The said property consists of about 500 acres of surface land with store building, employee's houses, tipple and mine [fol. 146] equipment and 260 coke ovens erected thereon, and about 195 acres of the Connellsville vein of coking coal with mining rights.

Fifth. That by reason of the nature of the property and of the business carried on in connection therewith the Trustees and the Husband have had and still have disputes and contentions concerning the proper construction of paragraph 2 of said Indenture declared to be a lien as aforesaid and especially concerning the questions of what are properly to be considered as profits and whether in view of the mining operations, the value of the coal in place shall or shall not be considered as capital and held subject to the lien aforesaid for the production of further income or profits to be applied toward the payment of the annuity aforesaid.

Sixth. That as a result of negotiations between the Trustees and the defendant, Gerald Purcell FitzGerald, he has agreed (a) To assign to the trustees his nine-tenths interest in the sinking fund of the Fayette Coke Company amounting to $88,733.20 in payment of the unpaid balance of $10,242.12 annuity to January 1, 1915, and in payment of $78,491.08 toward the accumulation of the fund of $400,000.00 hereinafter mentioned. (b) To secure to be paid to the Trustees within seven years from January 1, 1915, the sum of $321,508.92 with interest from January 1, 1915 at the rate of six per cent. per annum payable semi-annually, making in all $400,000.00. (c) The said sum of $321,508.92 is to be secured by mortgage to the Trustees by said Gerald Purcell FitzGerald on his undivided nine tenths interest in [fol. 147] the real property aforesaid known as the Fayette Coke Company property, bearing interest at the rate of six per cent. per annum payable semi-annually, with the right to anticipate the payment of any part of the principal sum otherwise than by the sinking fund hereinafter mentioned, at any interest paying period upon two months prior notice in writing to the Trustees of his intention so to do. Said mortgage to contain the usual covenants and in addition thereto those mentioned in clause (d), (e), (f) hereinafter. (d) Said mortgage to contain a covenant that the mortgagor will provide a sinking fund for the payment of the principal sum amounting to the nine tenths of twenty cents per ton for each ton of coal mined at the mines of the Fayette Coke Company and pay the same to the Trustees semi-annually within one month after each interest paying period. (e) Said mortgage to contain a provision that failure to pay the interest and principal as above provided or to pay taxes before they become delinquent, or the breach of any other covenant, shall entitle the trustees after 60 days default to declare the whole sum thereby secured to be due and payable and to prosecute a writ of scire facias for recovery thereof. (f) The said mortgage to contain a provision that the Trustees shall have the discretion to extend the time of payment of the balance due if the sinking fund shall not be sufficient to pay the whole within the seven years, provided, however, that the area of unmined coal shall not be less than 45 acres when the mortgage is fully paid. (g) The said sum of $78,491.08 and the sums paid from time to time on the

[fol. 148] principal of said mortgage shall be held by said Trustees during the life of the Wife in trust to invest all the aforesaid sums in good, safe, interest bearing lawful and secure trust securities and apply the net income therefrom together with the interest arising from the mortgage aforesaid to the payment to the Wife of the annuity aforesaid, the surplus income, if any, to be accumulated and applied as occasion may require to make up any deficiency that may occur in the payment of such annuity. (h) The profits accruing annually after January 1, 1915 from the Fayette Coke Company and the Shamrock Supply Company applicable under paragraph 2 of said Indenture to the annuity aforesaid of Twenty Thousand Dollars shall hereafter be paid to the said Gerald Purcell FitzGerald. (i) Upon the death of the Wife such part of said sum of $400,000.00 as shall have been paid to the Trustees together with the surplus accumulations thereof, if any, shall be paid to said Gerald Purcell FitzGerald, his heirs, executors, administrators or assigns and any balance unpaid on said mortgage shall be satisfied and discharged, provided, however, the fund of $300,000.00 to be accumulated under paragraph 3 of said Indenture for the benefit of the Wife and children shall be then fully accumulated, but if not so accumulated, the trustees shall retain so much of the securities then in their hands including any unpaid balance of said mortgage as may be necessary to fully accumulate said fund of $300,000.00 provided for in paragraph 3 of said Indenture; the amount of said fund accumulated to January 1, 1915, being $67,644.14. In consideration of which and of the waiving [fols. 149-150] of any claim which said Gerald Purcell FitzGerald may have for education of said children prior to 1911 amounting approximately to $6,000.00, the Trustees shall pay the one-half of the income of such fund, or of such part as shall be accumulated, during the minority of the children, to said Gerald Purcell FitzGerald for his own use, if the wife survive.

Seventh. Your petitioners believe that if said offer is accepted by them that the true intent and purpose of said Paragraphs 2 and 3 of said Indenture will be effected and that the interest of all beneficiaries thereunder fully conserved and protected.

Wherefore, your petitioners pray your Honorable Court to modify the decree hereinbefore entered on March 15, 1911

so as to permit the offer of the said defendant to be accepted and made effective and so as to permit the said defendant to execute the mortgage hereinbefore referred to. And they will ever pray &c.

Josiah V. Thompson. Charles E. Lenhart. William W. Parshall.

Duly sworn to by Josiah V. Thompson et al. Jurat omitted in printing.

[fol. 151] In Court of Common Pleas of Fayette County

Decree Modifying Decree of March 15, 1911—Filed March 5, 1915

Now, March fifth, 1915, on petition of the Trustees and defendant, Gerald Purcell FitzGerald, the court upon consideration modifies the decree made herein on March 15, 1911, so that the same may be better enforced and the provisions of said Indenture of December 6, 1906 carried out according to the true intent and meaning thereof, in the following particulars:

1. The defendant shall assign to the Trustees his nine tenths interest in the sinking fund of the Fayette Coke Company amounting to $88,733.20 in payment of the unpaid balance of $10,242.12 annuity to January 1, 1915 and in payment of $78,491.08 toward the accumulation of the fund of $400,000.00 hereinafter mentioned.

2. The defendant shall secure to be paid to said Trustees within seven years from January 1, 1915 the sum of $321,508.92, with interest from January 1, 1915 at the rate of six per cent. per annum payable semi-annually, making in all $400,000.00. He shall secure the said sum of $321,508.92 by mortgage to the Trustees on his undivided nine tenths interest in the real property described in the Bill filed herein known as the Fayette Coke Company property, bearing interest at the rate of six per cent. per annum, payable semi-annually, with the right to anticipate the payment of any part of the principal sum otherwise than by the sinking fund hereinafter mentioned at any interest paying period upon [fol. 152] two months prior notice in writing to the Trustees of his intention so to do. Said mortgage to contain the usual covenants and in addition thereto the following: (a) That

the mortgagor will provide a sinking fund for the payment of the said principal sum amounting to nine tenths of twenty cents per ton for each ton of coal mined at the mines of the Fayette Coke Company and pay the same to the Trustees semi-annually within one month after each interest paying period. (b) A covenant or condition that failure to pay the interest and principal as hereinabove provided or to pay taxes before they become delinquent or the breach of any other covenant shall empower the Trustees after sixty days default to declare the whole sum thereby secured to be due and payable and to prosecute a writ of scire facias for the collection of the whole principal of said mortgage. (c) A provision that the Trustees shall have the discretion to extend the time of payment of any balance due if the sinking fund shall not be sufficient to pay the whole within the seven years, provided, however, that the area of unmined coal shall not be less than 45 acres when the mortgage is fully paid.

3. The said sum of $78,491.08 and the sums paid from time to time on the principal of said mortgage shall be held by said Trustees during the life of the Wife in Trust to invest the same in good, safe interest bearing lawful and secure trust securities and apply the net income therefrom together with the interest arising from the mortgage aforesaid to the payment to the Wife of the annuity aforesaid, the surplus income, if any, to be accumulated and applied [fol. 153] as occasion may require to make up any deficiency that may occur in the payment of such annuity.

4. The profits accruing annually after January 1, 1915 from the Fayette Coke Company and the Shamrock Supply Company applicable under paragraph 2 of said Indenture to the annuity aforesaid of Twenty Thousand Dollars shall hereafter be paid to the said Gerald Purcell FitzGerald.

5. Upon the death of the Wife such part of said sum of $400,000.00 as shall have been paid to the Trustees, together with the surplus accumulations thereon, if any, shall be paid to the said Gerald Purcell FitzGerald, his heirs, executors, administrators or assigns, and any balance unpaid on said mortgage shall be satisfied and discharged, provided, however, the fund of $300,000.00 to be accumulated under paragraph 3 of said Indenture for the benefit of the Wife and children shall be then fully accumulated, but if

not so accumulated, the Trustees shall retain so much of the securities then in their hands including any unpaid balance of said mortgage as may be necessary to fully accumulate said fund of $300,000.00 provided for in paragraph 3 of said Indenture; the amount of said fund accumulated to January 1, 1915, being $67,644.14. In consideration of which and of the waiving of any claim which said Gerald Purcell FitzGerald may have for education of said children, prior to 1911, amounting to approximately $6,000.00, the trustees shall pay the one-half of the income of such fund, or of such part as shall be accumulated, during the minority of the [fol. 154] children, to said Gerald Purcell FitzGerald for his own use, if the Wife survive.

By the Court.

Attest: Wm. McClelland, Prothonotary.

In Court of Common Pleas of Fayette County

Petition and Order re Deposit of Debentures—Filed November 6, 1933

To the Honorable the Judges of said Court:

The petition of W. W. Parshall, A. A. Thompson and R. J. Arnett, Trustees, respectfully represents:

1. They are Trustees of Gerald P. FitzGerald appointed by your Honorable Court in the case styled in the caption hereof, and are engaged in the duties of their appointment.

2. Among the assets of the trust is Five Thousand ($5000.00) dollars par value American Chain Company, Inc., ten year six per cent sinking fund debenture bonds, due April 1, 1933, evidenced by debentures Nos. 2739, 2740, 2741, 2742 and 2743, each for one thousand ($1000.00) dollars.

3. American Chain Company, Inc., was unable to pay the bonds at their maturity and submitted to the holders thereof, including your petitioners, a plan for their deposit with Chemical Bank and Trust Company, depositary under a deposit agreement dated February 18, 1933, and their subsequent conversion into new American Chain Company five year first mortgage and collateral trust, six per cent

bonds at the rate of Twelve hundred and fifty ($1250.00) [fol. 155] dollars new bonds for each one thousand ($1000.00) dollars of old debentures, secured by mortgage of the physical assets of the Company and the pledge of all stock of subsidiary companies owned by it.

4. The Chemical Bank and Trust Company, depositary, has requested that the holders of the debentures deposit them pursuant to the deposit agreement, and petitioners are of opinion that it is for the best interests of the estate that they be authorized to deposit the debentures with the depositary, thereby becoming a party to the deposit agreement dated February 18, 1933, and in addition thereto, to execute a letter of transmittal and authorization to the depositary, and further to authorize American Chain Company, Inc. to place a mortgage or lien upon all of its plants and appurtenant equipment now owned or hereafter acquired, and upon all stocks of subsidiary companies now owned or hereafter acquired for the purpose of securing bonds to be issued in exchange for those deposited.

Wherefore, petitioners pray your Honorable Court to enter an Order authorizing them to deposit the debentures in the manner and form referred to in the preceding paragraph hereof, and to execute the authority therein referred to.

Wm. W. Parshall, A. A. Thompson, R. J. Arnett,
Trustees of G. P. FitzGerald.

[fol. 156] *Duly sworn to by W. W. Parshall et al. Jurat omitted in printing.*

ORDER

Now, November 6th, 1933, the foregoing petition presented in open court, and after and upon consideration thereof, it is ordered, adjudged and decreed:

1. That W. W. Parshall, A. A. Thompson and R. J. Arnett, Trustees of G. P. FitzGerald, in virtue of the proceedings of the Court of Common Pleas of Fayette County, at No. 618 in Equity, be, and hereby they are authorized and directed to deposit five American Chain Company, Inc. ten year six per cent sinking fund debenture bonds, due April 1, 1933, bearing serial Nos. 2739, 2740, 2741, 2742,

2743, each of the par value of one thousand ($1000.00) dollars, and of an aggregate value of five thousand ($5000.00) [fol. 157] dollars, belonging to the estate of which they are trustees, with Chemical Bank and Trust Company, Depositary, under deposit agreement dated February 18, 1933, relating to the plan of American Chain Company, Inc., for the conversion of said debentures into new American Chain Company, Inc. five year first mortgage and collateral trust six per cent bonds, at the rate of Twelve hundred fifty ($1250.00) dollars of new bonds for each one thousand ($1000.00) dollars of old debentures.

2. That the Trustees aforementioned be and hereby they are authorized and directed to deliver to the depositary above mentioned a letter of transmittal and to authorize American Chain Company, Inc. as security for the new bonds described in the preceding paragraph hereof, to place a mortgage or lien upon all of its plants and appurtenant equipment now owned or hereafter acquired, and upon all stocks of subsidiary companies, now owned or hereafter acquired, and upon all or part of the notes or obligations now or hereafter owned by it.

By the Court.

D. W. H.

Attest: W. H. Weilkey, Prothonotary.

[fol. 158] In Court of Common Pleas of Fayette County

Resignation of Andrew A. Thompson—Filed March 11, 1937

To the Honorable, the Judges of the Said Court:

I hereby tender my resignation as one of the three Trustees in the trust created by the Decrees entered in the case styled in the caption.

Andrew A. Thompson.

Order

And now, March 11th, 1937, the within resignation of Andrew A. Thompson as Trustee is hereby accepted and allowed, and it is ordered and decreed that upon due ac-

counting, he be discharged from the duties and liabilities of such Trustee.

By the Court.

H. A. Cottom, J.

Attest: John J. Brody, Prothonotary.

[fol. 159] In Court of Common Pleas of Fayette County

Petition to Restrain Prosecution by Linda, Princess of Thurn & Taxis, and Her Son, John, Against the Trustees in the District Court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity—Filed May 1, 1937

To the Honorable, the Judges of the Said Court:

The Petition of W. W. Parshall, A. A. Thompson, R. J. Arnett, and John S. Harah, Administrator of G. Schell Harah, Deceased, respectfully presents:

1. W. W. Parshall and R. J. Arnett are two of the Trustees duly appointed, qualified and acting in virtue of a certain written instrument called in this proceeding a Deed of Trust, which was attached to and made part of the original Bill; A. A. Thompson was until March 1, 1937, at which time he resigned, one of the said Trustees; G. Schell Harah was one of said Trustees until the date of his death, April 23, 1930, and of his estate John S. Harah and Second National Bank of Uniontown were appointed administrators, but the said Bank has resigned and been discharged, and the said John is now the sole Administrator.

The said parties are hereinafter called, collectively, "Petitioners."

2. This action was instituted October 27, 1910 by a bill entitled:

"Bill to remove defendants Gerald Purcell Fitzgerald and Charles E. Lenhart as trustees, and for appointment [fol. 160] of new trustees; and to establish a lien upon the properties of the copartnerships known as Fayette Coke Company and Shamrock Supply Company; and for the construction of the trust agreement and instructions to the trustees; and for an accounting by the defendants Fitz-

gerald and Lenhart; and for payment of all sums due and to become due upon agreement described in bill; and to restrain the alienation or encumbering of the properties of said co-partnerships; and for the appointment of a sequestrator or receiver of certain proportions of the share of the defendant Fitzgerald in the rents, issues and profits of said co-partnerships; and for general relief,"

to enforce the rights of Lida Eleanor Purcell Fitzgerald, who is now the relict of Victor, Prince of Thurn and Taxis, and Hereditary Magnate of Hungary, and her three children, John Purcell Fitzgerald, Edward Maurice Fitzgerald, and Gerald Purcell Fitzgerald, all of whom are parties Plaintiff in the Bill, in virtue of a certain written instrument dated December 6, 1906, a copy of which is attached to and made part thereof, as heretofore stated.

3. In virtue of the filing of the said Bill, the service of process on Defendants, the several Decrees entered in this cause and the various proceedings therein had and taken, which are by reference herein incorporated with like effect as if they were set out in extenso, this court acquired and still retains sole and exclusive jurisdiction of the rights of the parties in virtue of the said written instrument and of the administration of the funds arising therefrom, as well [fol. 161] as the supervision, control, and settlement of the accounts of the Trustees appointed to administer the trusts created by the said writing.

4. Notwithstanding the sole and exclusive jurisdiction of this court, the said Lida Eleanor, designating herself as Princess Lida of Thurn and Taxis, and her son John, who was then of age, in 1930 filed in the District Court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity, a bill charging mismanagement of the funds of the said trusts by Petitioners Parshall, Thompson and Arnett, and by Harah during his lifetime, praying to remove Petitioners Parshall, Thompson and Arnett as Trustees and to appoint successors in their stead and to surcharge Petitioners for sundry alleged losses.

5. Plaintiffs in the said Bill seek to review the acts of the Trustees in the administration of the said trusts notwithstanding that their conduct as Trustees is within the exclusive jurisdiction of this Court and this Court alone has jurisdiction to settle their accounts.

6. The filing of the said Bill is an invasion of and interference with the sole and exclusive jurisdiction of this court over the trusts created by the written instrument herein mentioned, and is an attempt to litigate and adjudicate a subject matter of which this court has sole and exclusive jurisdiction in another and different tribunal.

7. To the Bill filed as aforesaid in the District Court of the United States, Petitioners filed an Answer setting up the sole and exclusive jurisdiction of this court, and denying the jurisdiction of the District Court, and after the filing of the [fol. 162] said Answer, no effort was made by the Plaintiffs therein to bring the case to trial and Petitioners were led to believe that it had been abandoned.

8. Notwithstanding the delay and laches of Plaintiffs in the said Bill to bring it to a final determination, the Plaintiffs therein on April 12, 1937 filed an Amendment reiterating the charges laid in the original Bill and seeking to review the conduct and accounts of Petitioners, now pending in this court, and to try in the said District Court the issues arising out of the trusts created by the said written instrument, and of which this court alone has jurisdiction.

9. By the original Bill this court acquired jurisdiction of the persons of each and every party having an interest therein, and the Bill filed in the District Court does not bring in as parties certain persons having interests, to-wit, Second National Bank of Uniontown, Assignee of Gerald Purcell Fitzgerald, Settlor of the trust; Gerald Purcell Fitzgerald, Jr., and Edward Maurice Fitzgerald, beneficiaries of one of the trusts, and any proceedings had in the District Court are unavailing finally to settle and adjudicate any and all questions concerning the administration of each of the trusts created by the said writing.

Wherefore, Petitioners showing that the institution and prosecution of the said action in the District Court of the United States for the Western District of Pennsylvania is an invasion of and interference with the sole and exclusive jurisdiction of this court of the subject matter involved therein, pray that a decree be entered restraining Princess Lida of Thurn and Taxis and John Purcell Fitzgerald, [fol. 163] and each of them, from further prosecuting the

said action against Petitioners in the District court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity.

Wm. W. Parshall, A. A. Thompson, R. J. Arnett, John S. Harah, Administrator of G. Schell Harah, Deceased.

Duly sworn to by W. W. Parshall et al. Jurats omitted in printing.

[fol. 164] ORDER TO SHOW CAUSE, ETC.

And Now, June 1st, 1937, the within Petition presented in Court, and after and upon due consideration, it is ordered, adjudged and decreed that a rule issue directed to Princess Lida of Thurn and Taxis and John Purcell Fitzgerald, commanding them to show cause why they should not be restrained from prosecuting an action instituted by them against Petitioners in the District Court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity, returnable in fifteen (15) days after service, and hereby it is further ordered, adjudged and decreed that the said Princess Lida and John be and hereby they are restrained from prosecuting said action or proceeding in any way whatever, pending the final disposition of the said rule.

By the Court.

J. H. H. H. A. C.

Attest: John J. Brady.

[fol. 165] May 1, 1937, the within petition presented in Court, ordered filed and Wednesday, May 26, 1937, for hearing before Court in banc.

Thos. H. Hudson, President Judge.

Attest: John J. Brady.

June 1st, 1937, issuance of rule waived and service accepted on behalf of Lida, Princess of Thurn and Taxis, one of respondents.

R. Murray Gibson, Jr. Chad L. John.

In Court of Common Pleas of Fayette County

Respondent's Answer to Petition and Rule to Show Cause—Filed June 17, 1937

To the Honorable, the Judges of the Said Court:

And now comes Princess Lida of Thurn and Taxis, one of the Respondents named in the Petition filed in the above entitled case, and files this her answer, to the rule to show cause why she should not be restrained from further prosecuting the action against the Petitioners in the District Court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity.

1. The allegations in Paragraph 1 of the Petition are admitted.

2. Respondent admits the allegations in Paragraph 2 of the Petition but avers that the proceeding entitled as set forth in the second paragraph of the Petition was a proceed-
[fol. 166] ing in personam to compel specific performance of the Agreement, the "certain written instrument dated December 6, 1906," on the part of Gerald Purcell Fitzgerald, the Settlor of the Trust. Respondent avers that at no time has the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity, ever had control and possession, actual or potential, of the trust fund itself. Respondent, in further answer to Paragraph 2 avers and alleges that the said proceedings in the Court of Common Pleas of Fayette County, Pennsylvania, at No. 618 in Equity, were completely terminated and finished, and that no controversy remained pending in said court on July 8, 1930 when Respondent's Bill at No. 2451 in Equity was filed in the United States District Court for the Western District of Pennsylvania.

3. Respondent denies that by virtue of the past proceedings at No. 618 in Equity in this Court, that this Court acquired and still retains sole and exclusive jurisdiction of the rights of Princess Lida of Thurn and Taxis in relation to said trusts which resulted from said proceedings and of the administration of the funds which this Court decreed at No. 618 in Equity that the then Defendant, Gerald Purcell Fitzgerald, pay over in order that the Agreement of December 6, 1906, be performed, as well as the supervision, control

and settlement of the accounts of the trustees appointed to administer the said Trusts created by the said agreement. Respondent further alleges in answer to Paragraph 3 that said trustees have been appointed by the surviving trustees in each case in compliance with the provisions in Paragraph 6 of the said Agreement of December 6, 1906 and that any proceedings in this Court ratifying the selection or appoint-
[fol. 167] ment of Trustees have been ex parte proceedings without notice thereof to, or knowledge or consent of the Respondent, Princess Lida of Thurn and Taxis.

4. Respondent in answer to Paragraph 4 of the Petition for the Rule, further denies that this Court has sole and exclusive jurisdiction over the controversy in the suit filed by Princess Lida of Thurn and Taxis and her son John Purcell Fitzgerald in 1930 in the District Court of the United States for the Western District of Pennsylvania at No. 2451 in Equity, in which suit they charged mismanagement of the Trusts by the trustees, the Petitioners in this case, namely, William W. Parshall, A. A. Thompson, and Robert J. Arnett, and G. S. Harah, during his life time, and in which suit the prayers of the Bill were as

1. That the said Andrew A. Thompson, William W. Parshall and Robert J. Arnett, the present trustees, and John F. Harah and the Second National Bank of Uniontown, Pennsylvania, be cited and required to file a full and complete account or accounts of the said trust or trusts and that your Honorable Court award a writ or writ of subpoena of the United States of America directed to the said Defendants commanding them and each of them to appear and answer sec. reg. the Bill of Complaint, but not under oath, answer under oath being hereby expressly waived, and abide by and perform such order and decree in the premises as may be made.

2. That the said Andrew A. Thompson, William W. [fol. 168] Parshall and Robert J. Arnett be removed as trustees.

3. That any and all trustees under the said deed of trust be required to give bond with surety to be approved by the Court for the faithful performance of their duties.

4. For such other and further relief as the Court may deem meet and the exigencies of the case may require.

5. In answer to Paragraph 5 of Petition Respondent denies that this Court has sole and exclusive jurisdiction to hear and determine and pass upon the matters involved in the controversy in the said suit at No. 2451 in Equity in the District Court of the United States for the Western District of Pennsylvania. Respondent avers that said suit in said Federal Court is a proceeding in personam which any court having general equity powers and which has the parties before them under process from that court may hear, pass upon and determine.

6. In answer to Paragraph 6 of the Petition for the Rule, Respondent again denies that the filing of the Bill, in the above named Federal Court is an invasion of and interference with the jurisdiction of this Court, and Respondent further denies that this Court has sole and exclusive jurisdiction over the subject matter of the suit in the District Court of the United States for the Western District of Pennsylvania and that the filing of the said Bill is an attempt to litigate and adjudicate a subject matter of which this Court has sole and exclusive jurisdiction. Respondent avers that the subject matter in the litigation at 618 in Equity in this [fol. 169] Court and that of the litigation at No. 2451 in Equity in the District Court of the United States for the Western District of Pennsylvania are not the same, that the parties are not the same parties in both of the above mentioned suits, and that the suit in the Federal Court is an original and independent action and not one growing out of the suit at No. 618 in Equity in this Court.

7. In answer to Paragraph 7 of the Petition for the Rule, your Respondent avers that to the Bill filed as aforesaid in the above named Federal Court, the Petitioners in the case at bar filed a Motion to Dismiss the Bill on the grounds that the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity, had sole and exclusive jurisdiction of the controversy set forth in the said Bill and also that there was an absence of indispensable parties apparent on the face of the said Bill; that thereafter the Motion to Dismiss the Bill was argued in open court and that the said District Federal Court refused to so dismiss the Bill; that later the Petitioners filed an answer on the merits, which answer also contained a reiteration of the claim that the Court of Common Pleas of Fayette County, Sitting in Equity, has sole and exclusive jurisdiction of the subject matter of the

suit in the said District Federal Court. Respondent denies that Petitioners were led to believe the case had been abandoned. Respondent avers that from time to time, after the filing of the Bill and answer, negotiations for reaching a settlement were entered into between the Respondent's former attorney and the Attorneys for the Petitioners and that those negotiations continued until recently.

[fol. 170] 8. Respondent denies that she has been guilty of laches and avers that any delay in bringing this case in said Federal Court to a final determination has not been due to any fault of hers. Respondent admits that on April 12, 1937, with the permission of said District Federal Court, an amendment to the original Bill filed in the aforesaid Federal Court in which amendment was specifically set forth certain definite investments of the Trust funds which investments your Respondent claims are illegal investments of trust funds and from which losses have been sustained. By the amendment the prayers of the Bill have been amended to read:

1. That said defendants be required to answer the averments of this amendment.

2. That said defendants be required to restore to said Alimony Fund and to said Children's Fund the moneys lost by their illegal and negligent conduct as hereinbefore set forth.

3. That all present Trustees be removed.

4. That any and all Trustees under said deed of trust be required to give bond with surety to be approved by the Court for the faithful performance of their duties.

5. For such other and further relief as the Court may deem meet and the circumstances of the case may require.

Respondent avers that any accounts of Petitioners now pending in the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity, have been ex parte proceedings and have been filed without notice to Respondent and the other beneficiaries of the Trusts involved. Respond-
[fol. 171] ent denies that the Court of Common Pleas of Fayette County, Pennsylvania, alone has jurisdiction to try all issues arising out of the trusts created by the Agreement of December 6, 1906.

9. Respondent denies that this court by the Bill filed at No. 618 in Equity in this Court still retains exclusive jurisdiction over every party who had an interest in that controversy. Respondent avers that the controversy involving the subject matter of the suit in this Court at No. 618 in Equity was completed and terminated before 1930 when the Bill was filed by your Respondent and her son John Purcell Fitzgerald in the aforenamed Federal Court, and that this court has not jurisdiction over any party to the suit at No. 618 in Equity without the additional service of process of this court. Respondent avers that at the time the Bill was filed in this Court at 618 in Equity that she was a citizen and resident of Uniontown, Pennsylvania, but that she became a citizen of the Kingdom of Hungary many years before the Bill was filed in the United States District Court for the Western District of Pennsylvania at No. 2451 in Equity. Respondent in further answer to paragraph 9 of the Petition for the Rule alleges that the Second National Bank of Uniontown, the alleged Assignee of Gerald Purcell Fitzgerald, Settler of the Trusts; Gerald Purcell Fitzgerald, Jr., and Edward Maurice Fitzgerald, beneficiaries of one of the trusts, are not necessary parties to the suit in said Federal Court and that said Federal Court has already passed upon and adjudicated this question, and that this question is res adjudicata.

[fol. 172] Respondent further avers that she was at the time the Bill was filed in the United States District Court for the Western District of Pennsylvania and still is, a citizen of the Kingdom of Hungary and that John Purcell Fitzgerald, the other Complainant in the suit in said District Federal Court was at the time said Bill was filed in said Federal Court and still is a citizen and resident of the State of New York. She avers further, that the Petitioners, the defendants in the Federal Court suit, are all residents of the Commonwealth of Pennsylvania. Respondent also avers that the amount in controversy in the suit in the United States District Court for the Western District of Pennsylvania is over and above the sum of $3000.00.

Respondent further avers that the District Court of the United States for the Western District of Pennsylvania is a court having general equity powers and where there is diversity of citizenship and the requisite amount is involved, has equal and concurrent jurisdiction with state

courts having general equity powers, to hear and adjudicate the matters presented to the said Federal Court at 2451 in Equity and to grant the relief prayed for in the Bill filed in that case.

Your Respondent avers that she has a right to prosecute her action in the said Federal District Court to a conclusion and that this court does not have the power to deprive her of this right given to her by the Constitution and the laws of the United States.

Wherefore, your Respondent prays your Honorable Court to dissolve the temporary injunction granted in this case [fol. 173] and that the Petition be dismissed.

Walter P. Smart, R. Murray Gibson, Jr., Attorneys for Respondent.

Duly sworn to by Lida Thurn and Taxis. Jurat omitted in printing.

[fol. 174] IN COURT OF COMMON PLEAS OF FAYETTE COUNTY

DECREE MAKING ABSOLUTE RULE TO SHOW CAUSE WHY PRINCESS LIDA OF THURN & TAXIS AND JOHN FITZGERALD SHOULD NOT BE RESTRAINED FROM PROSECUTING A CERTAIN SUIT IN THE DISTRICT COURT OF THE U. S. FOR THE WESTERN DISTRICT OF PENNSYLVANIA—Filed June 29, 1937

A petition of the trustees of the funds held in virtue of the decrees heretofore entered in this cause, praying to restrain Princess Lida of Thurn and Taxis and John Fitzgerald, two of the Plaintiffs in this cause, from prosecuting a certain action in equity in the District Court of the United States for the Western District of Pennsylvania, having been presented on May 1, 1937, at which time May 27, 1937 was fixed as a time for argument, and the said argument having been had at the time fixed before the Court en banc, at which argument counsel for Respondents were heard at length and a rule to show cause why a restraining order should not be entered having issued and an answer having been filed, and a further hearing and argument having been had before the Court en banc on June 21, 1937, and the Court being of opinion that it has complete and exclusive jurisdiction, it is now

June 29, 1937, ordered, adjudged and decreed that the rule to show cause be and hereby it is made absolute, and that Lida, Princess of Thurn and Taxis and John Fitzgerald, two of the Plaintiffs in this cause, be and hereby they and each of them are enjoined and restrained from [fol. 175] prosecuting a certain suit in equity in the District Court of the United States for the Western District of Pennsylvania at No. 2451 In Equity, wherein the said Lida and John are Plaintiffs, and W. W. Parshall, A. A. Thompson, R. J. Arnett, and John S. Harah, Administrator of G. S. Harah, Deceased, as Trustees of the funds herein mentioned, are Defendants.

Thomas H. Hudson, President Judge.

Attest: John J. Brady.

Order—Filed June 29, 1937

And now, June 29th, 1937, at the instance of defendants, an exception is noted and a bill is sealed.

Thomas H. Hudson, President Judge. (Seal.)

Attest: John J. Brady.

[fol. 176] In Court of Common Pleas of Fayette County

Statement of Evidence—Filed July 14, 1937

Monday Morning, June 21, 1937, at Ten-fifteen o'clock, before the Honorable Thomas H. Hudson, President Judge, and the Honorable Harry A. Cottom, Judge.

Appearances:

E. C. Higbee, Esq., and D. D. Sturgis, Esq., for the petitioners.

Chad L. John, Esq., and Walter P. Smart, Esq., and R. Murray Gibson, Esq., for the respondents.

Mr. John: If the Court please, counsel asks counsel for the petitioners whether they will stipulate that Princess Lida of Thurn and Taxis is a citizen of Hungary and was at the time the Bill in the Federal Court was filed.

Mr. Higbee: To that inquiry the petitioners make the following response: Princess of Thurn and Taxis alleges in her Bill that she was at the time of the filing thereof and in her amendment that she still is a citizen of Hungary, to which the petitioners have replied that they are unadvised of that allegation and demand proof thereof; and they say that that is a question on which the jurisdiction of the Federal Court depends, if it could otherwise take jurisdiction of this controversy, and that that issue is not here involved, because the petition concedes, for the [fol. 177] purposes of the question of the sole and exclusive jurisdiction of this court, that the necessary jurisdictional facts as to diversity of citizenship exist in the litigation in the Federal Court.

Mr. John: Will counsel for the petitioner admit that the amount involved is more than three thousand dollars?

Mr. Higbee: To that inquiry the petitioners respond as follows: That that is a fact on which the jurisdiction of the Federal Court depends, if otherwise it might have jurisdiction of this controversy, and that is a question for the determination of the Federal Court, if it may proceed with the litigation, and that the petition does not challenge the jurisdiction of the District Court as to the requisite amount in controversy.

Mr. Smart: Counsel for respondents offer in evidence the records in the case between Princess Lida of Thurn and Taxis, a citizen of the Kingdom of Hungary, and John Purcell FitzGerald, a citizen of the state of New York, plaintiffs, and Andrew A. Thompson, William W. Purcell, and Robert H. Arnett, trustees for the plaintiff, and others, and John S. Harah, administrator of the estate of G. S. Harah, deceased, all of whom are citizens of the Commonwealth of Pennsylvania, defendants, in the District Court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity. In connection with that we offer in evidence the bill of complaint, the amended bill of complaint, the defendants' motion to dismiss, the answer [fol. 178] of the defendants to the merits, and the answer to the amended bill of complaint.

Mr. Higbee: Of course, if your Honor please, that offer is clearly inadmissible, for the reason that you cannot prove the record in a court by offering a copy. The record would have to be exemplified under the Act of Congress; but if we can hear a purpose we may waive that.

Mr. Smart: We just desire to have before this court the record of the proceedings in the United States court for the purpose of this record. This is the very proceeding that they are trying to restrain and we think this court should have that record before them.

Judge Hudson: You have no objection to that, have you?

Mr. Higbee: No, that objection will be withdrawn.

Certificates

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes of testimony taken by me upon the trial of the above cause, and that the foregoing is a true and correct transcript of the same.

E. T. Chamberlin, Official Stenographer.

[fol. 179] Order

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

H. A. Cottom, Judge.

In Court of Common Pleas of Fayette County

Opinion—Filed September 13, 1937

Before Hudson, P. J., Cottom, J. and Graff, P. J., 33rd Judicial District, Specially Presiding

Hudson, P. J.:

The bill in this proceeding was filed October 27, 1910, and the cause has been since pending in this court.

A petition presented May 1, 1937, by the three trustees of two funds, one known as the Alimony Fund amounting to $400,000.00 and the other as the Children's Fund amounting to $300,000.00, created as hereafter stated, to restrain Lida Eleanor Purcell Fitzgerald, the Princess of Thurn and Taxis, and her son, John, from prosecuting a certain action in the District Court of the United States for the Western District of Pennsylvania against the trustees, respecting the administration of those funds, gives rise to the question presently involved.

The petition was presented and a date fixed for a hearing, when it was argued fully by each side. The respondents

not having answered, the court issued a rule, to which an answer was filed; it raised no question of fact, and another argument was had on the legal point. Thereafter the rule was made absolute.

[fol. 180] The controversy arose out of a contract, dated December 6, 1906, between Gerald Purcell Fitzgerald of the first part, Lida Eleanor Purcell Fitzgerald of the second part, and Josiah V. Thompson, C. E. Lenhart and Gerald Purcell Fitzgerald, Trustees, of the third part, whereby Fitzgerald agreed to pay the trustees out of the profits of a coke works in which he had a nine-tenths interest, and situate in Fayette county, an annuity of $20,000.00, and to pay one-third of the profits of that business, after deducting the annuity, to the trustees to create a fund of $300,000.00. The income from the latter fund was to be distributed equally between Lida Eleanor Purcell Fitzgerald during her lifetime and the children, and at her death the principal was to be distributed to the three children.

The bill sought to remove two of the trustees, to have the agreement construed, the trustees instructed by this court, and a lien to secure the payments decreed against the property of Fitzgerald. It was in reality a bill for the specific performance of the contract. In the bill both the Princess and her son, John, were plaintiffs, and all the persons having plaintiffs substantially the whole of the relief prayed

An answer was filed, a trial was had, and a decree granting plaintiffs substantially the whole of the relief prayed was entered. The payments required by the contract were declared liens on the real estate and other property of Fitzgerald.

Thereafter that decree remained in full force and effect until March 5, 1915, when on petition and after hearing, it was substantially modified.

[fol. 181] A certain part of the $300,000.00 having been accumulated, it was directed that Fitzgerald should execute a mortgage to the trustees to secure the payment of $400,000.00, out of the income whereof the annuity of $20,000.00 should be paid during the lifetime of Lida Eleanor Purcell Fitzgerald, at which date the principal should be distributed to him, his heirs or assigns, and to secure the payment of a sufficient sum to complete the $300,000.00 fund. The former of these is known as the Alimony Fund and the latter as the Children's Fund. The sums of money were to be invested and re-invested by the trustees. The mortgage has

been fully paid and each of the funds has since been invested and the income paid.

The trustees filed an account in 1925, which was confirmed, and another on July 7, 1931, to which certain exceptions were filed, which remain pending.

The day after the latter account was filed, Lida Eleanor Purcell Fitzgerald and John Fitzgerald filed a bill in the District Court of the United States criticising certain investments made by the trustees and their management of the estate. It prayed that they be removed and required to give bond, and to account for certain losses alleged to have occurred. To this bill an answer was filed by the trustees denying the charges, and setting up that by the proceedings heretofore outlined this court had obtained complete and exclusive jurisdiction, and that the District Court was without jurisdiction.

Nothing was done to bring that cause to trial, and in April, 1937, an amendment was filed, in which it was sought to surcharge the trustees with a number of investments [fol. 182] on which it was alleged there had been, or would be, losses. All, with a possible single exception, of the investments with which it is sought to surcharge the trustees, are included in one or the other of the two accounts filed in this proceeding.

The trustees then presented the present petition to restrain.

The record is voluminous and what has been said is intended to indicate the nature of the proceeding.

The position of the trustees is that the institution of the original action, the various proceedings had therein, and the several decrees entered, conferred upon this court complete and exclusive jurisdiction, and that as a result no court of co-ordinate jurisdiction may interfere with the subject matter of the litigation. In other words, they claim that the funds involved are trust funds; that they were in effect created by the decrees of this court; that this court has the constructive possession and potential control thereof, and that the administration of the funds is exclusively within the control of this court.

The three judges who heard the argument are in accord with that view and accordingly the rule was made absolute.

These funds are an entity, a thing, or res; they are a trust fund held by the trustees for the use of beneficiaries, and are to be administered and distributed only by the trus-

tees. Obviously, an action having these funds as the subject matter and dealing with their administration is in rem. [fol. 183] It is not disputed that this court has jurisdiction.

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

Peck et al. v. Jenness et al., 48 U. S. (7 Howard) 612 (624).

This is clearly implied in the recent case of Bowman v. Gum, Inc., 193 Atl. 271, in which it is said (274):

"Equity having assumed jurisdiction of this controversy, that jurisdiction will be retained until justice has been done."

Respondents do not dispute that this court has jurisdiction, but deny that it is exclusive. Since this court, however, was the first to acquire jurisdiction, it is entitled to retain it to the exclusion of every other court of coordinate right.

[fol. 184] In Farmers' Loan Co. v. Lake St. Rd. Co., 177 U. S. 51, a leading case on the subject, it is said (61):

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts."

Here the suit was brought to establish a lien against particular property and to create and administer a trust.

When these trusts terminate, it will be necessary for this court to assume the possession and disposition of the property in order to make final distribution and settlement. [fol. 185] The facts clearly embrace every element necessary to give this court constructive possession and potential control.

This court has already settled one account of the trustees and another is pending before it. The District Court has no jurisdiction of either account, and the orderly way to determine the liability of the trustees to surcharge is by an accounting.

It is true that there are cases in which where the state court has jurisdiction the Federal court may, where there is the requisite diversity of citizenship and amount, take jurisdiction to a limited extent and for definite purposes.

Commonwealth Trust Co. v. Atwood, 78 Fed. (2) 92, affirmed 297 U. S. 613, is a fair illustration of such cases. In the former it was said by Judge Woolley (94):

"It is certain that, so far as the res of the estate now being administered by the Orphans' Court are concerned, the jurisdiction of that court is exclusive. A federal court cannot reach into the state court and take the res or enforce a right to specific property in possession of its receiver or trustee, except upon application to the court which appointed him. Riehle v. Margolies, 279 U. S. 218, 49 S. Ct. 310, 73 L. Ed. 669; Harrison v. Moncravie (C. C. A.) 264 P. 776, 779. It is likewise certain that a federal district court, on jurisdiction otherwise shown, as diversity

of citizenship or, as in this case, liquidation of a national bank, may establish 'a claim constituting the basis of a right to participate in the distribution of property in the [fol. 186] possession of' another court. The judgment of the federal court does not in such case purport to deal with property. Yonley v. Lavender, 21 Wall, 276, 22 L. Ed. 536. It deals solely with the existence and amount of a claim, Riehle v. Margolies, supra; Harrison v. Moncravie, supra, which when established by decree takes its 'share of the estate as administered by the probate court.'"

In the latter it was said by Justice MacReynolds (924):

"The original bill revealed that the Receiver had been denied participation as a cestui que trust in the assets held by petitioner Trust Company, and asked an adjudication of his rights therein. He did not seek direct interference with possession or control of the assets; he prayed that his right to partake thereof be determined."

Here the right of the respondents, each a party to the proceeding in this court, has already been determined. They do not seek to establish any right to participate in the funds. Their complaint is solely that the trustees have, to some extent, and in certain particulars, mismanaged the fund. This is a question of administration and not an attempt to establish a right.

Respondents argue that whether the jurisdiction of this court be exclusive is to be determined, not by it, but by the District Court. With that we cannot agree. This court has power to determine whether it has jurisdiction, and in like [fol. 187] manner, its authority to determine whether that jurisdiction is exclusive of other courts of concurrent jurisdiction, is plenary. Were it otherwise, and the question were for the District Court, it would be superior to this court, and they would not be co-ordinate.

This court being the first to decide the question, its decision is binding and conclusive unless reversed by a proper appellate proceeding.

Having authority to decide the question of jurisdiction and the extent and character of that jurisdiction, it is the duty of this court to exercise that power and to vindicate its own right and authority.

To restrain a party litigant from interfering with an orderly disposition of the pending cause is therefore not only the right, but the duty of this court.

Per Curiam, T. H. H.

Attest: John J. Brady, Prothonotary.

[fol. 188]

Proceedings in United States District Court, at No. 2451, in Equity

IN DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 2451

Between

PRINCESS LIDA OF THURN AND TAXIS, a Citizen of the Kingdom of Hungary, and John Purcell Fitzgerald, a Citizen of the State of New York, Plaintiffs,

and

ANDREW A. THOMPSON, WILLIAM W. PARSHALL and ROBERT H. ARNETT, Trustees for the Plaintiffs and Others, and John S. Harah and Second National Bank of Uniontown, Pa., a Corporation Created and Existing under the Laws of the United States, Administrators of the Estate of G. S. Harah, Deceased, Former Trustee for the Plaintiffs, and Others, All of Whom Are Citizens of the Commonwealth of Pennsylvania, Defendants

BILL OF COMPLAINT

To the Honorable the Judges of the said court:

Your Orators complain and say:

1. The said plaintiffs, Princess Lida of Thurn and Taxis is a citizen of the Kingdom of Hungary and John Purcell [fol. 189] Fitzgerald is a citizen of the State of New York.

2. The said defendants, Andrew A. Thompson, William W. Parshall and Robert J. Arnett, Trustees for the Plaintiffs and others, and John F. Harah and Second National Bank of Uniontown, Pa., a corporation created and existing

under the Laws of the United States, Administrators of the Estate of G. S. Harah, Deceased, former trustee for the Plaintiffs and others, are citizens of the Commonwealth of Pennsylvania.

3. On, to-wit, the 6th day of December, 1906, Gerald Purcell Fitzgerald, named as party of the first part, made and executed a certain deed of trust to Lida Eleanor Purcell Fitzgerald, now Princess of Thurn and Taxis, one of the Plaintiffs, named as party of the second part, and Josiah V. Thompson, Charles E. Lenhart and himself as trustees, named as parties of the third part, by the terms of which certain trusts were established in favor of the said Lida Eleanor Purcell Fitzgerald, now Princess of Thurn and Taxis, the wife of the said Gerald Purcell Fitzgerald, and John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, children of the said Gerald Purcell Fitzgerald and Lida Eleanor Purcell Fitzgerald. A true and correct copy of said deed of Trust is hereto attached and made a part hereof and marked Exhibit A.

4. The present trustees under said deed of trust are the above named Andrew A. Thompson, William W. Parshall and Robert J. Arnett. Andrew A. Thompson became trustee on, to-wit, January 21, 1919, William W. Parshall on, [fol. 190] to-wit, February 4, 1915, and Robert J. Arnett on, to-wit, June 3, 1930. The said G. S. Harah who became trustee on, to-wit, January 1, 1919, recently died and Letters of Administration on his estate have been issued to the said John S. Harah and Second National Bank of Uniontown, Pennsylvania.

5. Subsequent to the execution of the said deed of trust the said Lida Eleanor Purcell Fitzgerald obtained a divorce a mensa et thoro, viz. on the fifth day of December, 1906, in the High Court of Justice of Ireland, and thereafter, on to-wit, the 26th day of July, 1907, the said Lida Eleanor Purcell Fitzgerald was granted an absolute divorce by special act of Parliament.

6. Two trusts were established under said deed of trust. The said Gerald Purcell Fitzgerald first agreed by the terms of said deed to provide a fund for the payment of certain monies to his said wife by way of alimony, so called, namely, three thousand pounds per annum from the 5th day of December, 1906 to the twelfth day of August, 1907,

or to such date as an act of Parliament might be passed for the absolute divorcing of the said Lida Eleanor Purcell Fitzgerald from him, $15,000.00 per annum for three years from the date of passage of such act of Parliament, and at least $20,000.00 per annum thereafter during the term of her natural life. The corpus of this trust was to be furnished from the share of the profits of the said grantor accruing annually from two certain business enterprises, namely, the Fayette Coke Company and Shamrock Supply Company. This Trust is generally referred to as the "Alimony Fund."

[fol. 151] 7. It is also provided in said deed of trust that he will pay annually one-third of his share of the profits in the said two enterprises beginning February 1, 1907, until a fund of $300,000.00 should be accumulated and that one-half of the income of said fund of $300,000.00 after it had been so accumulated, should be paid to the grantor's said wife for and during the term of her natural life and the other one-half thereof should, in the discretion of the trustees be allowed to accumulate or to be distributed to the said three children of the grantor and his said wife, or be paid to his said wife until the oldest of said children should reach the age of twenty-one years, with the further provisions that if all the children should die before his said wife, the income from said funds might, in the discretion of the Trustees, be paid to his said wife, and if not paid to her, it should be paid to the said grantor, his executors, administrators or appointees. The oldest child, John Purcell Fitzgerald, became of age on September 24, 1920. This trust is generally referred to as the Children's Fund."

It is further provided in said deed of trust that each child, upon attaining the age of twenty-one years, should be entitled to the payment of his share of one-half of the income of said Children's Fund, and the discretion of the trustees to pay more than one-half of the entire income therefrom to the grantor's wife should cease and determine, but the obligation as to the payment to her of the remaining one-half was not to be affected. There are various other provisions in said deed as, upon reference thereto will appear.

[fol. 152] 8. Your orators are informed and believe that there is in the hands of the trustees upwards of $456,016.58 in the Alimony Fund, including undistributed income of upwards of $31,562.22 and upwards of $315,381.57 in the

Children's Fund, including undistributed income of upwards of $18,777.63.

9. Among the investments in the Alimony Fund, the plaintiffs are informed and believe that there are three certain mortgages one being from Horatio S. Dumbald to G. S. Harah, Andrew A. Thompson and William W. Parshall, Trustees, for $10,000.00 dated October 22, 1924, and recorded in the Recorder's Office of Fayette County, Pennsylvania, in Mortgage Book Vol. 175, page 1. The said mortgage debt was payable one (1) year from the date thereof but no part thereof has ever been paid and interest is due thereon from October 24, 1926. The whole of said mortgage, with interest, therefore, are long overdue.

Another of said mortgages was given by C. O. LaClair to Elizabeth Kremer for $15,000.00, dated May 9, 1923, and recorded in said recorder's office in Mortgage Book Vol. 171, page 75. This mortgage was payable at the rate of $3000.00 per annum, beginning May 9, 1924, but nothing has ever been paid thereon and interest thereon is due from July 7, 1928. The whole of said mortgage and interest are, therefore, long overdue. This mortgage was assigned on, to-wit, August 8, 1925, to G. S. Harah, Andrew A. Thompson and William W. Parshall, Trustees.

The third of said mortgages is said by the trustees to [fol. 193] be that of Alice M. Brown for $4500.00 upon which interest is due from February 1, 1923. Your orators have been unable to discover said mortgage upon examination of the records in said recorder's office and have no knowledge of its identity or existence.

10. Your orators believe and aver that the said mortgages were and are unfit investments of trust funds and were improperly made by the said trustees and that the said trustees have been grossly negligent in the collection of the monies secured thereby.

11. Your orators are further informed and believe that the said trustees have invested a large proportion of both said funds in securities outside of Pennsylvania and in securities which have caused losses and are apt to cause still further losses to the trust.

12. Your orators are further informed and believe that the said trustees are mismanaging the property and estate under their charge and that the said property and estate is

likely to be jeopardized by the continuance of said trustees in their said places of trust, that they have failed to exhibit true and perfect inventories and render just and full accounts thereof according to law and that they are unfit persons to act as such trustees.

13. The said Gerald Purcell Fitzgerald and the said Maurice Fitzgerald are not made parties because they are not within the jurisdiction of the Court, the former residing in Ireland and the latter in England, and the said Gerald Purcell Fitzgerald son of the said Gerald Purcell Fitz- [fol. 194] gerald, is not made a party because making him a party would oust the jurisdiction of the Court.

14. The matter in controversy, as hereinbefore appears, exceeds the sum or value of $3000.00, exclusive of interests and costs.

15. Your orators are without adequate remedy at law and are in need of equitable relief.

Your orators, therefore, pray that it be ordered, adjudged and decreed as follows:

1. That the said Andrew A. Thompson, William W. Parshall and Robert J. Arnett, the present trustees, and John F. Harah and the Second National Bank of Uniontown, Pennsylvania, be cited and required to file a full and complete account or accounts of the said trust or trusts and that your Honorable Court award a writ or writs of subpoena of the United States of America directed to the said Defendants commanding them and each of them to appear and answer sec. reg. the Bill of Complaint, but not under oath, answer under oath being hereby expressly waived, and abide by and perform such order and decree in the premises as may be made.

2. That the said Andrew A. Thompson, William W. Parshall and Robert J. Arnett be removed as trustees.

3. That any and all trustees under the said deed of trust be required to give bond with surety to be approved by the Court for the faithful performance of their duties.

4. For such other and further relief as the Court may deem meet and the exigencies of the case may require.

And they will ever pray, etc.,

Frederic W. Miller.

[fol. 195] *Duly sworn to by John P. Fitzgerald et al., Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

Come now, W. W. Parshall, A. A. Thompson and Robert J. Arnett, and Second National Bank of Uniontown, a corporation, and John S. Harah, Administrators of the Estate of G. S. Harah, deceased, Defendants in the case styled in the caption hereof and hereinafter called "Defendants", and move that the Bill of Lida, Princess of Thurn & Taxis, and John Purcell Fitzgerald, plaintiffs in the case styled in the caption and hereinafter called "Plaintiffs", be dismissed, in support of which motion they assign the following reasons:

[fol. 196] 1. No separable controversy exists between Plaintiffs and Defendants.

2. Gerald Purcell Fitzgerald, Jr., who is a citizen of the State of Pennsylvania, and a resident of the Western District thereof, and who has an interest in the trust and fund identical with that of the plaintiff John, is an indispensable party.

3. Gerald Purcell Fitzgerald, former husband of plaintiff, Lida, and father of plaintiff John, who is a citizen and resident of the Free State of Ireland, and who has a reversionary interest in the trust and fund, is an indispensable party.

4. Edward Maurice Fitzgerald, a son of plaintiff Lida, and brother of plaintiff John, who is a citizen and resident of the Free State of Ireland, and who has an interest in the trust and fund identical with that of the Plaintiff John, is an indisputable party.

5. Neither the said Gerald, former husband of Plaintiff Lida, nor the said Edward Maurice, can be reached by the process of this Court.

6. No decree finally determining the rights and interests of the beneficiaries of the trust and fund can be entered without making them and each of them parties.

7. In virtue of the following facts, matters and things, the Court of Common Pleas of Fayette County, Sitting in Equity, acquired and still retains, sole and exclusive jurisdiction of the trust and funds referred to in the Bill, and has sole and exclusive jurisdiction of all the controversies here and now sought to be litigated, that is to say:

(a) On October 27, 1910, Josiah V. Thompson, as Trustee [fol. 197] for plaintiffs Lida and John, and as Trustee for the said Edward and Gerald Jr., plaintiff Lida, plaintiff John, and the said Edward and Gerald, Jr., by their guardian ad litem William McClelland, filed their bill at No. 618 in Equity, in the Court of Common Pleas of Fayette County, Sitting in Equity, against Gerald Purcell FitzGerald, individually, and as Trustee, Charles E. Lenhart, as Trustee, Gerald Purcell FitzGerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company, and Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, which was entitled,

"Bill to remove defendants Gerald Purcell FitzGerald and Charles E. Lenhart as Trustees; and for appointment of new trustees; and to establish a lien upon the properties of the co-partnerships known as Fayette Coke Company and Shamrock Supply Company, and for the construction of the trust agreement and instructions to the trustees; and for an accounting by the defendants FitzGerald and Lenhart; and for payment of all sums due and to become due upon agreement described in bill; and to restrain the alienation or encumbering of the properties of said copartnerships; and for the appointment of a sequestrator or receiver of certain proportions of the share of the defendant FitzGerald in the rents, issues, and profits of said copartnerships; and for general relief."

in which they set up the Indenture dated December 6, 1906, which is Exhibit "A" of the Bill, and whereby they prayed:

[fol. 198] "Wherefore, your orators need equitable relief, and pray this Honorable Court, having jurisdiction under the laws as well as by the express terms of the aforesaid recited instrument, over the parties thereto and to be ef-

fected thereby, and having jurisdiction over the said properties, all of which are situate within the County;

1. To remove the defendants FitzGerald and Lenhart from their respective offices of trustee under the aforesaid agreement, and to permit the vacancies to be filled by the plaintiff Josiah V. Thompson, or that said vacancies be filled by proper persons.

2. To declare and establish a lien upon the properties of the copartnerships known as Fayette Coke Company and Shamrock Supply Company for the benefit of the beneficiaries under the aforesaid agreement of December 6, 1906, as contemplated and provided therein, to secure the payment of the sums by said agreement provided to be paid.

3. To construe the trust agreement and establish the rights of the trustees and the rights and interests of the beneficiaries thereunder, and to instruct the trustees accordingly.

4. To require the defendants Fitzgerald and Lenhart as members of the aforesaid copartnerships, to account for and pay over to the trustee now in office and the other trustees to be appointed, or to a sequestrator or receiver to be appointed herein, the proportion of the profits of the Fayette [fol. 199] Coke Company and the Shamrock Supply Company provided by the aforesaid agreement of December 6, 1906, to be paid over to the trustees, and for such subsequent accounting as may be necessary during the term of the aforesaid agreement.

5. To appoint, pending this suit and the appointment of new trustees, a sequestrator or receiver, to whom the defendants FitzGerald and Lenhart shall, within thirty days from the order of the Court in this case, render an account of the earnings and profits of said properties of the Fayette Coke Company and the Shamrock Supply Company for the nine months ending September 30, 1910, and thereupon pay over to the said sequestrator or receiver nine-tenths of said profits, and to whom the said defendants FitzGerald and Lenhart shall, from time to time thereafter, as this Honorable Court may direct, render account of the earnings and profits of said properties, and thereupon pay nine-tenths of said profits to said sequestrator or receiver; said

amount so paid to said sequestrator or receiver to be thereafter paid out from time to time to the parties thereto entitled under the direction of this Court.

6. To restrain, by its injunction, both pendente lite and permanent, the defendants FitzGerald and Lenhart, or either of them, and their or either of their agents, attorneys and servants, from in any wise alienating or encumbering any of the properties of the aforesaid copartnerships, to the [fol. 200] prejudice of the trustees or beneficiaries under the aforesaid agreement of December 6, 1906.

7. For general relief."

(b) Defendants having appeared, and defendant Gerald having presented his petition to remove the said cause to the District Court of the United States for the Western District of Pennsylvania, which was refused, and answers having been filed by the several Defendants, the cause was so proceeded in that the Court decreed;

"Now March 3rd, 1911, this cause came on to be heard at this term and was argued by counsel; and now, March 15th, 1911, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

I

That the defendant, Gerald Purcell FitzGerald forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell FitzGerald, the sum of sixteen thousand four hundred and sixty dollars ($16,460.00), and that the said Trustees pay the same to Lida Eleanor Purcell FitzGerald.

II

That the defendant, Gerald Purcell FitzGerald, forthwith pay to the Trustees for the benefit of Lida Eleanor Purcell FitzGerald, John Purcell FitzGerald, Edward Maurice FitzGerald and Gerald Purcell FitzGerald, minor Children of the said defendant, Gerald Purcell FitzGerald, and of the said Lida Eleanor Purcell FitzGerald, the sum of five thou-
[fol. 201] sand three hundred and eighty-eight dollars ($5,388.00), upon the trusts set forth in Paragraph Third of the agreement dated December 6, 1906, and set forth at large in the Bill filed herein.

III

That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title, and interest of the defendant, Gerald Purcell FitzGerald, in and to the real property described in Paragraph Ninth of the Bill filed herein and known as the Fayette Coke Company property.

IV

That the defendant, Gerald Purcell FitzGerald be and is hereby removed from his office as Trustee of the trusts created by said agreement of December 6, 1906, and he is hereby directed to account for and pay over to Josiah V. Thompson and Charles E. Lenhart, Trustees of the trusts created by said agreement of December 6, 1906, and to the Trustee to be hereafter chosen by them, the said Thompson and Lenhart, or appointed by the Court, in place of the said Gerald Purcell FitzGerald, all sums in his hand or for which he is accountable under said agreement of December 6, 1906.

V

That Richard W. Dawson, Esq., be and he is hereby appointed Referee to take and state the account of the said defendant Gerald Purcell FitzGerald as Trustee as aforesaid [fol. 202] said and report the same to the Court, and upon final confirmation of said report that judgment be entered against the said Gerald Purcell FitzGerald for the amount found due on such accounting.

VI

That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell FitzGerald within ten days; in case they are unable to agree they shall report their disagreement to the Court forthwith at the expiration of said period of ten days.

VII

That the defendant, Gerald Purcell FitzGerald, pay the cost of this proceeding."

(c) An appeal having been taken to the Supreme Court of Pennsylvania, and the decree affirmed, and a writ of error having been sued out to the Supreme Court of the United States, which was dismissed, the Court of Common Pleas of Fayette County received a report of Thompson and Lenhart as Trustees that they had appointed William M. Thompson to succeed Gerald Purcell FitzGerald, removed by the decree herein recited, accepted the petition of C. E. Lenhart and appointed W. W. Parshall Trustee to succeed William M. Thompson, and issued to him a certificate of his appointment, and thereafter decreed as follows:

"Now, March 5, 1915, on petition of trustees and defendant Gerald Purcell FitzGerald, the Court, upon con-
[fol. 203] sideration modifies the decree made herein on March 15, 1911, so that the same may be better enforced and the provisions of said indenture of December 6, 1906, carried out, according to the true intent and meaning thereof, in the following particulars:

1. The defendant shall assign to the trustees his nine-tenths interest in the Sinking Fund of the Fayette Coke Company amounting to $88,733.20 in payment of the unpaid balance of $10,242.12 annuity to January 1, 1915, and in payment of $78,491.08 toward the accumulation of the fund of $400,000.00 hereinafter mentioned.

2. The defendant shall secure to be paid to said trustee within seven years from January 1, 1915, the sum of $321,508.92, with interest from January 1, 1915, at the rate of six per cent per annum, payable semi-annually, making in all $400,000.00. He shall secure the said sum of $321,508.92 by mortgage to the trustees on his undivided nine-tenths interest in the real property described in the Bill filed herein, known as the Fayette Coke Company property, bearing interest at the rate of six per cent. per annum, payable semi-annually, with the right to anticipate the payment of any part of the principal sum otherwise than by the Sinking Fund, hereinafter mentioned, at any interest paying period upon two months prior notice in writing to the trustees of his intention so to do. Said mortgage to contain the usual covenants and in addition thereto the following:

(a) That the mortgage will provide a sinking fund for
[fol. 204] the payment of the said principal sum amounting

to nine-tenths of twenty cents per ton for each ton of coal mined at the mines of the Fayette Coke Company and pay the same to the trustees semi-annually within one month after each interest paying period.

(b) A covenant or condition that failure to pay the interest and principal as herein provided or to pay the taxes before they become delinquent or the breach of any other covenant shall empower the trustees, after sixty days default, to declare the whole sum thereby secured to be due and payable and to prosecute a writ of Scire Facias for the collection of the whole principal of said mortgage.

(c) A provision that the trustees shall have the discretion to extend the time of payment of any balance due if the Sinking Fund shall not be sufficient to pay the whole within the seven years, provided, however, that the area of unmined coal shall not be less than 45 acres when the mortgage is fully paid.

3. The said sum of $78,491.08 and the sums paid from time to time on the principal of said mortgage shall be held by said trustees during the life of the wife in trust to invest the same in good, safe, interest bearing lawful and secure trust securities and apply the net income therefrom together with the interest arising from the mortgage aforesaid to the payment to the wife of the annuity aforesaid, the surplus income, if any, to be accumulated and applied as occasion may require to make up any deficiency [fol. 205] that may occur in the payment of such annuity.

4. The profits accruing annually after January 1, 1915, from the Fayette Coke Company and the Shamrock Supply Company, applicable under paragraph 2 of said indenture to the annuity of Twenty Thousand Dollars shall hereafter be paid to the said Gerald Purcell FitzGerald.

5. Upon the death of the wife such part of said sum of $400,000.00 as shall have been paid to the trustees, together with the surplus accumulations thereon, if any, shall be paid to the said Gerald Purcell FitzGerald, his heirs, executors, administrators and assigns, and any balance unpaid on said mortgage shall be satisfied and discharged, provided, however, the fund of $300,000.00 to be accumulated under paragraph 3 of said indenture for the benefit of the

wife and children shall be then fully accumulated, but if not so accumulated the trustees shall retain so much of the securities then in their hands, including any unpaid balance of said mortgage as may be necessary to fully accumulate said fund of $300,000.00 provided for in paragraph 3 of said indenture; the amount of said fund accumulated to January 1, 1915, being $67,644.74. In consideration of which and of the waiving of any claim which said Gerald Purcell FitzGerald may have for the education of said children, prior to 1911, amounting to approximately $6,000.00, the trustees shall pay the one half of the income of such [fol. 206] fund, or of such part as shall be accumulated, during the minority of the children to said Gerald Purcell FitzGerald for his own use, if the wife survive.

By the Court."

(d) On December 31, 1918, accepted the resignation of Josiah V. Thompson as Trustee, and discharged him from further accounting, it appearing the funds of the trust were intact, and on January 21, 1919, accepted the resignation of Lenhart as Trustee, and discharged him from further duties, accountings and reckonings, and confirmed the appointment of A. A. Thompson as his successor.

(e) On October 9, 1925, received and confirmed nisi the First and Partial Account of G. S. Harah, A. A. Thompson and W. W. Parshall as Trustees, and on December 7, 1925, confirmed the Account absolutely.

(f) June 3, 1930, confirmed the appointment of Robert J. Arnett as Trustee, to succeed G. S. Harah, then deceased.

(g) On July 7, 1930, W. W. Parshall and A. A. Thompson, surviving Trustees, filed their Second and Partial Account of G. S. Harah, W. W. Parshall, and A. A. Thompson, as stated by them, which is now pending in the said Court for confirmation.

8. The trust and fund were created and now exist in virtue of the decrees of the Court of Common Pleas of Fayette County in a proceeding to which all the persons in interest, including Plaintiffs, were parties.

9. By the terms of Exhibit "A" of the Bill, jurisdiction was conferred upon the Court of Common Pleas of Fayette

[fol. 207] County, which has attached in virtue of the proceedings had and taken in that Court, which became and remains sole and exclusive.

Higbee, Matthew & Lewellyn, Attorneys for Defendants. D. M. Hertzog, Atty. for the Administrator of the Estate of George S. Harah, Decd.

Duly sworn to by W. W. Parshall et al. Jurat omitted in printing.

[fol. 208] ORDER

And now, July 29, 1930, the within motion to dismiss presented in Court and ordered filed.

R. M. Gibson, Judge.

IN UNITED STATES DISTRICT COURT

OPINION ON DEFENDANTS' MOTION TO DISMISS BILL OF COMPLAINT—Filed May 12, 1931

SCHOONMAKER, J.:

The Defendants in this case have moved to dismiss the Bill of Complaint, because:

(1) There is an absence of indispensable parties apparent on the face of the bill.

(2) The Court of Common Pleas of Fayette County, Penn'a, Sitting in Equity, has acquired, and still retains, sole and exclusive jurisdiction of the trust fund referred to in the Bill of Complaint, and has sole and exclusive jurisdiction of all the controversies sought to be litigated in the instant case.

This reason is not a reason that is apparent from the face of the Bill; it is a question of facts which must be determined after answer and proof. We, therefore, cannot now dismiss this bill on the allegation that the Fayette County court has exclusive jurisdiction of the controversy.

This leaves for consideration the only other question of whether or not it is apparent in the face of the Bill that there is an absence of indispensable parties.

The bill discloses that the Plaintiff, Lida of Thurn and Taxis, formerly Lida Eleanor Purcell Fitzgerald, and John [fol. 209] Purcell Fitzgerald, her son, have brought this bill against the Defendants, the present trustees, under a deed of trust dated December 6, 1906, wherein Gerald Purcell Fitzgerald, in view of certain divorce proceedings between himself and Lida Eleanor Purcell Fitzgerald, agreed to pay to his wife certain alimony in lieu of an allowance of alimony by the court, and to secure the payment of the same, agreed to pay and turn over to the trustees named in the deed of trust, certain profits arising from certain coal properties located in Fayette County, Pennsylvania; and in the same deed of trust, the said Fitzgerald further agreed to turn over to the said trustees certain incomes of the Fayette County coal properties as a trust fund for the benefit of the said Lida Eleanor Purcell Fitzgerald and the children of the said Lida Eleanor Purcell Fitzgerald and Gerald Purcell Fitzgerald, namely, John Purcell Fitzgerald, Edward Maurice Fitzgerald, and Gerald Purcell Fitzgerald, Jr.

It is alleged in the bill that the Plaintiff, Princess Lida, is a citizen of the Kingdom of Hungary, and that John Purcell Fitzgerald is a citizen of the State of New York.

Gerald Purcell Fitzgerald and Edward Maurice Purcell FitzGerald are outside of the jurisdiction of this Court; Gerald Purcell FitzGerald residing in Ireland and Edward Maurice Purcell FitzGerald in England. Gerald Purcell FitzGerald, son of the said Gerald Purcell FitzGerald, is a resident of Fayette County, Pennsylvania; and the joining of him as a party plaintiff would oust the jurisdiction of this Court.

[fol. 210] The Bill alleges that the present Trustees, into whose hands these trust funds covered by this trust deed, have come, have mismanaged the estate; have invested the trust funds in unfit investments; have been grossly negligent in the collection of moneys secured by the trust; have invested a large part of the trust funds in securities outside of Pennsylvania, and in securities which have caused losses to the estate; have failed to exhibit true and perfect inventories and render just and full accounts of the trusteeship. The Bill further alleges that the continuance of said Trustees in the said places of trust will likely jeopardize the estate.

On this state of facts the defendants contend that the former husband of the Plaintiff, Princess Lida, Gerald Purcell FitzGerald, and his two sons, Gerald Purcell FitzGerald, Jr., and Edward Maurice Purcell FitzGerald, are indispensable parties in this case and that the Court can not proceed to judgment herein in their absence without prejudicing the rights of the absent parties. It becomes necessary, therefore, in the consideration of this Motion to apply to this case the indispensable-party test.

The Supreme Court of the United States has laid down the rule that should be followed in cases of this kind in Barney v. Baltimore City, 73 U. S. 280 (284):

"And there is a third class, whose interest in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the Court can not proceed. In such cases the [fol. 211] Court refuses to entertain the suit when these parties can not be subjected to its jurisdiction."

This rule for determining who is an indispensable party was again approved by the Supreme Court in the case of Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 (48), where that court, considering Section 737 of the Revised Statutes of the United States and Equity Rule No. 47, (the subject matter of which is now found in Equity Rule No. 39), which provided for considerations of a case in spite of the absence of certain parties who would be proper parties to the suit, but whose rights would not be prejudiced by decision of the case between the parties before the court.

In this case, Mr. Justice Day said:

"This statute and rule permit the court to proceed with the trial and adjudication of the suit, as between parties who are properly before it, and preserves the rights of parties not voluntarily appearing, providing the rights are not prejudiced by the decree to be rendered in the case. This rule has been said to be declaratory of the already-established equity practice. Shields v. Barrow, 17 How. 130; 1 Street's Fed. Equity Practice, Sec. 533, and cases there cited. This rule does not permit a Federal Court to proceed to a decree in that class of cases in which there

is an absence of indispensable, as distinguished from proper, or even necessary parties, for neither the absence of formal, or such as are commonly termed necessary parties, will defeat the jurisdiction of the court; provided, [fol. 212] in the case of necessary parties, their interests are such and so far separable from those of parties before the Court, that the decree can be so shaped that the rights of those actually before the Court may be determined without necessarily affecting other persons not within the jurisdiction."

As we apply the indispensable-party test to the trust under consideration in this case, the question arises; have the Plaintiffs a separable interest in the trust such as will permit the Court to give judgment wherein as affecting their interest, which will not prejudice the rights of the other parties interested in this trust fund, who are not before the Court.

So far as concerns the accounting by the Trustees, we are of the opinion that the accounting asked for can be granted without prejudicing any of the rights of other parties interested in the estate.

In the case of Payne v. Hook, 74 U. S. 425 (431), that Court held that one distributee of an intestate estate might bring a bill in Equity in the United States against an Administration in spite of the fact that the other distributees were not made parties; the Court holding that the other distributees are not indispensable parties to the decision of the case.

To the same effect is the rule in Atwood v. Rhode Island Hospital Trust Company, 255 Federal 162, where the Court held a beneficiary was not an indispensable party against the Trustees and another beneficiary in spite of the fact that an adverse decision would indirectly deprive the [fol. 213] absent beneficiary, who claimed to be an indispensable party, of a bequest made to it.

In the instant case, no harm or prejudice will come to the other parties to this trust, if we were to grant the Plaintiff the relief prayed for in this Bill, to the extent of requiring the defendants to account for their actions in carrying out the trust. Nor will the interests of the other parties be affected by a decree compelling the Trustees to file a bond in this case. It may be that without the presence of the other

parties to the trusts, we shall have no authority to remove the Trustees. However, it is not necessary to decide this case because a bill has been presented on which at least part of the relief prayed for, can be granted without prejudicing the rights of any of the absent beneficiaries on this trust.

An order may therefore be submitted denying the motion to dismiss the Bill of Complaint.

IN UNITED STATES DISTRICT COURT

ANSWER TO MERITS

1

We are not advised whether Lida of Thurn and Taxis is a citizen of the Kingdom of Hungary otherwise than by the averments of the Bill. In October 1910 she was a citizen of the State of Pennsylvania residing in the City of Uniontown; later she intermarried with one Victor, Prince of Thurn and Taxis, and hereditary magnate of Hungary, who is, we are informed now deceased; whether by this marriage she became a citizen of the Kingdom of Hungary, and of the [fol. 214] effect of the death of the said Victor on such citizenship we are not advised; we, however, aver, that she spends a large portion of her time in the United States and in the City of Uniontown, in the County of Fayette and within the Western District of Pennsylvania, which we believe she could not legally do were she not a citizen of the United States; we do not admit the allegation as respects her citizenship and demand proof thereof.

We are not advised of the place of residence of John Purcell Fitzgerald.

2

We admit the allegations of this paragraph of the Bill.

3

We admit the allegations of this paragraph of the Bill in so far as they aver the execution of the contract or deed of trust, and that Exhibit "A" is a true and correct copy thereof. We, however, deny that the said agreement or deed remains effective and operative according to its tenor, but aver that it has been changed, modified and in practical

effect superseded, as will be made to appear more in detail, by the further averments hereof.

4

We admit the allegations of this paragraph of the Bill, except that the name of Administrator Harah is John S., and aver the date of the death of G. S. Harah was April 23, 1930.

5

We admit the allegations of this paragraph of the Bill, [fol. 215] except that we say the Act of Parliament merely divorced Lida Eleanor Purcell Fitzgerald and Gerald Purcell Fitzgerald.

6

We deny the averment that the Trusts were established under the said Deed of Trust, and aver that the Trusts were established and exist in virtue of the decrees herein stated in detail. We admit the remaining allegations of this paragraph in so far as they correctly state the terms of Exhibit "A".

7

We admit the allegations of this paragraph in so far as it accurately states the provision of Exhibit "A".

8

We admit the allegations of this paragraph of the Bill in so far as they state amounts, but we deny that the item of $31,562.22 is undistributed income, and aver that it is income accumulated pursuant to a decree of the Court of Common Pleas of Fayette County, hereinafter referred to.

9

We admit the allegation that $10,000.00 of the assets consist of a mortgage executed and delivered by H. S. Dumbauld. We aver that this is a First Mortgage, a lawful investment for trust funds, and that at the time of its execution and delivery the value of the property greatly exceeded the indebtedness. It is true that there is some overdue interest not paid, but under prevailing business conditions we do not deem it wise and expedient to foreclose the mortgage at this time.

[fol. 216] We admit that $15,000.00 of the assets are invested in a mortgage executed and delivered by C. O. LaClair. We aver that this is a First Mortgage, a lawful investment, that the value of the property greatly exceeded at the time the investment was made the amount of the indebtedness, and that the investment is amply secured. We deny that there is overdue interest on this mortgage, and aver that the estate has not and will not sustain any loss as respects this investment.

$4500.00 of the assets of the estate is invested in the Brown mortgage, which is a First Mortgage and a lawful investment, and the estate has not and will not sustain any loss in this behalf.

10

We deny that the mortgages were the unfit investments of trust funds. We further deny that they were improperly made, and we deny that we have been grossly negligent in the collection of the money secured thereby.

11

We admit that substantial proportions of the funds are invested in securities outside of Pennsylvania, but we deny that they have caused losses and are about to cause still further losses to the Trusts, and aver that on July 7, 1930, when our Account, hereinafter referred to more particularly, was filed, the value of the investments and securities showed a substantial enhancement.

12

We deny that we are mismanaging the property and es-
[fol. 217] tate; we deny that the property is liable to be jeopardized by our continuance in office, and we deny that we have failed to exhibit true and perfect inventories and render just and full accounts according to law, and we deny that we are unfit persons to act as such trustees. We have annually furnished to Plaintiff Lida itemized and detailed statements of the funds of the said Trusts, presenting the investments in detail, and itemizing the receipts and disbursements, and on October 9, 1925, we filed in the Court of Common Pleas of Fayette County at No. 618 in Equity, the cause in which the decrees creating the present Trusts were entered, a detailed Account as of June 30, 1925, which was confirmed by the said court, and on July 7, 1930, without any

demand or request of any person interested in the said trusts, we filed a complete Account of the said Trusts covering the period from June 30, 1925, to and including April 23, 1930, the date of the death of Trustee Harah, which Account remains pending for confirmation in the said court, to which no exceptions have been filed or objection made by either plaintiffs Lida or John.

13

We admit that Gerald Purcell Fitzgerald and Edward Maurice Fitzgerald are not within the jurisdiction of this court; but we deny that this is any sufficient reason for not joining them as parties, and aver that they are indispensable parties and that this court is without jurisdiction to entertain this Bill because of its inability to reach by its process these persons, who are indispensable parties.

[fol. 218] We admit that to join Gerald Purcell Fitzgerald, Jr., would oust the jurisdiction of the court, but aver that he is an indispensable party, and that because to join him would oust the jurisdiction, this court is without jurisdiction.

14

We admit that the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs.

15

We admit that the matters of which Plaintiffs complain are cognizable in a Court of Equity, but we deny that this Court has jurisdiction to entertain the complaint.

16

For further answer we say that in virtue and by reason of the following facts, The Court of Common Pleas of Fayette County, Sitting in Equity, acquired and still retains sole and exclusive jurisdiction to hear and determine all the matters and things of which Plaintiffs complain, that is to say:

(1) On or about October 27, 1910, Plaintiff Lida and Plaintiff John, with others, filed their Bill in the Court of Common Pleas of Fayette County at No. 618 in Equity, the parties to which are as follows:

"Josiah V. Thompson, as trustee for Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald, and Gerald Purcell Fitzgerald, of the trusts hereinafter described; Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald [fol. 219] and Gerald Purcell Fitzgerald, infants, by William McClelland, their Guardian ad Litem, Plaintiffs,

and

Gerald Purcell Fitzgerald, individually and as Trustee of the trusts hereinafter described; Charles E. Lenhart, as Trustee of the trusts hereinafter described; Gerald Purcell Fitzgerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; Charles E. Lenhart, Manager of Fayette Coke Company and Shamrock Supply Company, Defendants."

(2) This Bill was entitled,

"Bill to remove defendants Gerald Purcell Fitzgerald and Charles E. Lenhart as trustees, and for appointment of new trustees; and to establish a lien upon the properties of the co-partnerships known as Fayette Coke Company and Shamrock Supply Company; and for the construction of the trust agreement and instructions to the trustees; and for an accounting by the Defendants Fitzgerald and Lenhart; and for payment of all sums due and to become due upon agreement described in the Bill; and to restrain the alienation or encumbering of the properties of said co-partnerships; and for the appointment of a sequestrator or receiver of certain proportions of the share of the defendant Fitzgerald in the rents, issues and profits of [fol. 220] said co-partnerships; and for general relief,"

and continued the following prayers:

"Wherefore, your orators need equitable relief, and pray this Honorable Court, having jurisdiction under the law, as well as by the express terms of the aforesaid recited instrument, over the parties thereto and to be affected thereby, and having jurisdiction over the said properties, all of which are situate within said County:

"1. To remove the Defendants Fitzgerald and Lenhart from their respective offices of trustees under the afore-

said agreement, and to permit the vacancies to be filled by the Plaintiff Josiah V. Thompson, or that said vacancies be filled by appointment by the Court, as trustees, of two proper persons.

"2. To declare and establish a lien upon the properties of the co-partnerships known as Fayette Coke Company and Shamrock Supply Company, for the benefit of the beneficiaries under the aforesaid agreement of December 6, 1906, as contemplated and provided therein, to secure the payment of the sums by said agreement provided to be paid.

"3. To construe the trust agreement and establish the rights of the trustees and the rights and interests of the beneficiaries thereunder, and to instruct the trustees accordingly.

"4. To require the defendants Fitzgerald and Lenhart as members of the aforesaid co-partnerships, to account for [fol. 221] and pay over to the trustee now in office and the other trustees to be appointed, or to a sequestrator or receiver to be appointed herein, the proportion of the profits of the Fayette Coke Company and the Shamrock Supply Company provided by the aforesaid agreement of December 6, 1906, to be paid over to the trustees, and for such subsequent accountings as may be necessary during the term of the aforesaid agreement.

"5. To appoint, pending this suit and the appointment of new trustees, a sequestrator or receiver, to whom the defendants Fitzgerald and Lenhart shall, within thirty days from the order of the Court in this case, render an account of the earnings and profits of said properties of the Fayette Coke Company and the Shamrock Supply Company for the nine months ending September 30, 1910, and thereupon pay over to the said sequestrator or receiver nine-tenths of said profits, and to whom the said defendants Fitzgerald and Lenhart shall, from time to time thereafter, as this Honorable Court may direct, render account of the earnings and profits of said properties, and thereupon pay nine-tenths of said profits to said sequestrator or receiver; said amount so paid to said sequestrator or receiver to be thereafter entitled, under the direction of this Court.

"6. To restrain, by its injunction, both pendente lite and permanent, the defendants Fitzgerald and Lenhart, or either of them, and their or either of their agents, attorneys and [fol. 222] servants, from in any wise alienating or incumbering any of the properties of the aforesaid copartnerships, to the prejudice of the trustees or beneficiaries under the aforesaid agreement of December 6, 1906.

"7. For general relief."

(3) By this bill it is averred that Plaintiff Lida was then a citizen of Pennsylvania residing in Uniontown, and that Plaintiffs John, Edward and Gerald, were wards of the High Court of Chancery of England, and it is made to appear by other parts of the record in the said cause that they were all born in the United States, Edward and Gerald in Uniontown.

(4) By the said bill it is averred that Gerald Purcell Fitzgerald, the principal defendant, was a resident of the Island of Waterford in Ireland, and a subject of the Kingdom of Great Britain, and by the record it is made to appear that he by petition filed prayed for the removal of the cause to the United States Circuit Court, which was refused.

(5) The gravamen of the Bill is the contract, there called an "indenture" dated December 6, 1906, which is Exhibit "A" of Plaintiffs Bill.

(6) By the record it is made to appear that Defendants filed answer, that a plenary trial was had and was so proceeded in that it was decreed:

"Now March 3d, 1911, this cause came on to be heard at this term and was argued by counsel; and now, March 15th, 1911, thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

[fol. 223] I

"That the Defendant, Gerald Purcell Fitzgerald, forthwith pay to the trustees for the benefit of Lida Eleanor Purcell Fitzgerald, the sum of sixteen thousand four hundred and sixty dollars ($16,460.00) and that the said trustees pay the same to Lida Eleanor Purcell Fitzgerald.

II

"That the Defendant, Gerald Purcell Fitzgerald, forthwith pay to the trustees for the benefit of Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, minor children of the said defendant, Gerald Purcell Fitzgerald, and of the said Lida Eleanor Purcell Fitzgerald, the sum of Five thousand three hundred and eighty-eight dollars ($5,388.00), upon the trusts set forth in Paragraph Third of the agreement dated December 6, 1906, and set forth at large in the Bill filed herein.

III

"That the payments provided for in said agreement of December 6, 1906, be and the same are hereby adjudged to be a lien on all the right, title and interest of the Defendant, Gerald Purcell Fitzgerald, in and to the real property described in Paragraph Ninth of the Bill filed herein and known as the Fayette Coke Company property.

[fol. 224]

IV

"That the Defendant, Gerald Purcell Fitzgerald, be and he is hereby removed from his office as trustee of the trusts created by said agreement of December 6, 1906, and he is hereby directed to account for and pay over to Josiah V. Thompson and Charles E. Lenhart, Trustees of the trusts created by said agreement of December 6, 1906, and to the Trustee to be hereafter chosen by them, the said Thompson and Lenhart, or appointed by the Court, in place of the said Gerald Purcell Fitzgerald, all sums in his hand or for which he is accountable under said agreement of December 6, 1906.

V

"That Richard W. Dawson, Esq., be and he is hereby appointed Referee to take and state the account of the aforesaid defendant Gerald Purcell Fitzgerald as Trustee as aforesaid and report the same to the court, and upon final confirmation of said report that judgment be entered against the said Gerald Purcell Fitzgerald for the amount found due on such accounting.

VI

"That Josiah V. Thompson and Charles E. Lenhart, Trustees as aforesaid, are hereby directed to appoint some competent and judicious person as Trustee in place of the said Gerald Purcell Fitzgerald within ten days; in case they are unable to agree they shall report their disagreement to the Court forthwith at the expiration of said period of ten days.

[fol. 225]

VII

"That the Defendant, Gerald Purcell Fitzgerald, be and he is hereby restrained and enjoined from in any wise alienating, encumbering or otherwise disposing of his interest in the property of the Fayette Coke Company and in the property of the Shamrock Supply Company unless and until there shall first have been accumulated in the hands of the Trustees under the said agreement of December 6, 1906, the sum of Three Hundred Thousand Dollars as provided by Paragraph third of said agreement.

VIII

"That the Defendant, Gerald Purcell Fitzgerald pay the costs of this proceeding."

(7) The record further makes it appear that from this decree an appeal was taken to the Supreme Court of Pennsylvania, that the decree was affirmed, and that an appeal therefrom taken to the Supreme Court of the United States was dismissed for want of jurisdiction.

(8) Thereafter the trustees, acting in behalf of the beneficiaries of the Trusts, presented to the said Court on March 5, 1916, their petition, a true and correct copy whereof, identified as Exhibit "A", is hereto attached and made part hereof, whereupon pursuant to the prayer thereof the Court entered the following Decree;

"Now, March 5, 1915, on petition of Trustees and Defendant Gerald Purcell Fitzgerald, the Court, upon consideration modifies the decree made herein on March 15, [fol. 226] 1911, so that the same may be better enforced and the provisions of said indenture of December 6, 1906,

carried out, according to the true intent and meaning thereof, in the following particulars:

1. The defendant shall assign to the trustees his nine-tenths interest in the Sinking Fund of the Fayette Coke Company amounting to $88,733.20 in payment of the unpaid balance of $10,242.12 annuity to January 1, 1915, and in payment of $78,491.08 toward the accumulation of the fund of $400,000.00 hereinafter mentioned.

2. The defendant shall secure to be paid to said trustees within seven years from January 1, 1915, the sum of $321,508.92, with interest from January 1, 1915, at the rate of six per cent per annum, payable semi-annually, making in all $400,000.00. He shall secure the said sum of $321,508.92 by mortgage to the trustees on his undivided nine-tenths interest in the real property described in the Bill filed herein, known as the Fayette Coke Company property, bearing interest at the rate of six per cent per annum, payable semi-annually, with the right to anticipate the payment of any part of the principal sum otherwise than by the sinking fund, hereinafter mentioned, at any interest paying period upon two months prior notice in writing to the trustees of his intention so to do. Said mortgage to contain the usual covenants and in addition thereto the following:

[fol. 227] (a) That the mortgagor will provide a sinking fund for the payment of the said principal sum amounting to nine-tenths of twenty cents per ton for each ton of coal mined at the mines of the Fayette Coke Company and pay the same to the trustees semi-annually within one month after each interest paying period.

(b) A covenant or condition that failure to pay the interest and principal as herein provided or to pay the taxes before they become delinquent or the breach of any other covenant shall empower the trustees, after sixty days default, to declare the whole sum thereby secured to be due and payable and to prosecute a writ of Scire Facias for the collection of the whole principal of said mortgage.

(c) A provision that the trustees shall have the discretion to extend the time of payment of any balance due if the Sinking Fund shall not be sufficient to pay the whole within seven years, provided, however, that the area of

unmined coal shall not be less than 45 acres when the mortgage is fully paid.

3. The said sum of $78,491.08 and the sums paid from time to time on the principal of said mortgage shall be held by said trustees during the life of the wife in trust to invest the same in good, safe interest bearing lawful and secure trust securities and apply the net income therefrom together with the interest arising from the mortgage aforesaid to the payment to the wife of the annuity aforesaid, the surplus income, if any, to be accumulated and [fol. 228] applied as occasion may require to make up any deficiency that may occur in the payment of such annuity.

4. The profits accruing annually after January 1, 1915, from the Fayette Coke Company and the Shamrock Supply Company, applicable under paragraph 2 of said indenture to the annuity of Twenty Thousand Dollars shall hereafter be paid to the said Gerald Purcell Fitzgerald.

5. Upon the death of the wife such part of said sum of $400,000.00 as shall have been paid to the trustees, together with the surplus accumulations thereon, if any, shall be paid to the said Gerald Purcell Fitzgerald, his heirs, executors, administrators and assigns, and any balance unpaid on said mortgage shall be satisfied and discharged, provided, however, the fund of $300,000.00 to be accumulated under paragraph 3 of said indenture for the benefit of the wife and children shall then be fully accumulated, but if not so accumulated the trustees shall retain so much of the securities then in their hands, including any unpaid balance of said mortgage as may be necessary to fully accumulate said fund of $300,000.00 provided for in paragraph 3 of said indenture; the amount of said fund accumulated to January 1, 1915, being $67,644.74. In consideration of which and of the waiving of any claim which said Gerald Purcell Fitzgerald may have for the education of said children, prior to 1911, amounting to approximately [fol. 229] $6,000.00, the trustees shall pay the one-half of the income of such fund, or of such part as shall be accumulated, during the minority of the children to said Gerald Purcell Fitzgerald for his own use, if the wife survive.

By the Court."

(9) Pursuant to the said decree the payments therein required were made, the mortgage executed and delivered, the principal of the Children's Fund fully realized, the mortgage paid and satisfied, and since that time the said Court has accepted resignations of certain Trustees, approved the appointment of new Trustees, entertained and confirmed the former Account of the Trustees, and has now pending before it for confirmation their Second Account herein already mentioned.

(10) We aver that the funds in question were created under and in virtue of the decrees of the Court of Common Pleas of Fayette County, Sitting in Equity, that the Trusts are being administered under and subject to its supervision and direction, and that it has sole and exclusive jurisdiction in the premises.

17

For further answer we say that by writing under his hand and seal, dated the 11th day of June, 1928, Gerald Purcell Fitzgerald assigned, transferred and set over to Second National Bank of Uniontown, a corporation created under the laws of the United States, doing business in the City of Uniontown, in the County of Fayette, and State of Pennsylvania, and in the Western District thereof, the legal title [fol. 230] to the Trust fund herein called Alimony Fund, subject to the rights and interests of Plaintiff Linda therein, so that the said bank became and now is the owner and holder of the legal title to the said Fund, in trust for certain uses and purposes; that it has a material interest in the controversy here involved, that its rights will be affected by any decree entered herein, and that decrees may not be herein entered without affecting and adjudicating its rights and interests, that it is an indispensable party, and that to join it would oust the jurisdiction of the Court.

Wherefore, having answered, we pray that the Bill may be dismissed.

Andrew A. Thompson, William W. Parshall, Robert J. Arnett.

In United States District Court

Amendment to Bill of Complaint

And now, to-wit, April 8th, 1937, come the above named plaintiffs and file this Amendment to the Bill of Complaint heretofore filed at the above number in manner following, to-wit:

By substituting for paragraphs numbered (8), (9), (10) and (11) of said Bill of Complaint, the following paragraphs numbered (8), (9), (10), (11), (12), (13), (14), (15), (16), and (17).

(8) Your orators are informed and believe that there is in the hands of the trustees upwards of $459,532.30 in the Alimony Fund, including undistributed income of up-
[fol. 231] wards of $11,791.99, and upwards of $313,247.10 in the Children's Fund, including undistributed income of upwards of $269.12.

(9) Your orators are informed, believe and aver that among the investments in the Alimony Fund are the following bonds purchased by defendants:

C. Benton Cooper, Rittenhouse Square 1st Mortgage R. E. 6% Gold Bond 1944
Par Value $10,000.00 Cost $10,100.00 Market value $2850.
(Purchased prior to June 30, 1925)

Park Lexington Corporation—1st Mortgage Leasehold 6½% Sinking Fund Gold Bonds 1953
Par $10,000.00 Cost $9950.00 Market value $3900.00
(Deposited with Empire Trust Co., Dec. 8, 1931.)
(Purchased prior to June 30, 1925)

Wetherbee Sherman Co. 1st Mortgage 6% Income Bond 1944
Par $2500 Cost $2437.50 Market Value $800.00
(Deposited with Chemical Bank & Trust Co. under agreement dated Oct. 6, 1932.)
(Purchased prior to June 30, 1925)

United States of Brazil 20 year External Gold Loan 8% Bond—1941
Par $10,000 Cost $9950.00 Market value $5175.00
(Purchased prior to June 30, 1925)

[fol. 232] United States of Brazil 30 year 7% Gold Bond 1952

Par $10,000.00 Cost $9625.00 Market value $4100.00

(Purchased after June 30, 1925 and before Dec. 31, 1929)

(U. S. of Brazil Funding Bonds—Interest on above to Dec. 31, 1934—$4500.00)

(Value not known)

Pennsylvania Operating Corp. 1st Mortgage Fee 6% S. F. 15 year Bond—1939

Par $10,000 Cost $9900.00 Market value $3150.00

(Deposited with Dillon Reed & Co. under agreement dated October 28, 1934)

(Purchased after June 30, 1925 and prior to Dec. 31, 1929)

As indicated above, the exact dates of purchase of said bonds are unknown to plaintiffs.

(10) Your orators are informed, believe and aver that among the investments in the Children's Fund are the following securities purchased by defendants:

Pennsylvania Operating Company 1st Mtg. 6% S. F. 15 year—1939

Purchased July, 1925, six bonds for $5940.00; purchased October, 1926, four bonds @ $3960.00; total par value $10,000.00; present market value $3150.00.

Vanderbilt Avenue Building Corporation 1st Mtg. Leasehold 6½% S.F. G.B. 1944

Par value $10,000.00 Cost price $9875 Present value $1000

(Date of purchase not known.)

[fol. 233] Republic of Columbia 6% Ext. S. F. G. B. 1928—1961

Purchased April 21, 1928 for $9475. Present market value $3150

Tokyo Electric Light Company, Ltd.—1st Mtg. G. B. 6% Dollar Series 1953

Purchased July 19, 1928 Cost $9025; Present market value $7300

200 shares Pennsylvania Railroad Company stock. (Purchased prior to 1925.) Exact date unknown.

Cost price $9922.50 Present market value $9600.00

(11) Your orators further aver that the securities listed in the two foregoing paragraphs are improper and illegal investments of said trust funds.

(12) That prior to June 30, 1925, and at a time unknown to your orators, there was purchased by said Trustees, for and out of the Children's Fund, $25,000.00 par value of 7%—1942 Bonds of Rodgers Brown Iron Company, at a cost of $24,395.00; that on June 30, 1925, said bonds were known by said defendants to be of a market value of $20,000.00 and said bonds were eventually sold by said Trustees on October 10, 1927, for the sum of $10,000.00.

(13) That said foregoing investment was an illegal, unsafe and improper investment of said trust funds.

(14) Your orators are informed, believe and aver that as of December 31, 1936, that out of the Alimony Fund a total of $131,998.53 was and is invested in mortgages in and near the City of Uniontown, Fayette County, Pennsylva-
[fol. 234] nia; upon some of which there are delinquent taxes.

(15) Your orators further aver that because of the unsettled and poor financial, industrial and other unfavorable conditions in and about the City of Uniontown, that the total amount thus invested from said Alimony Fund is too great for safe, legal interest bearing investments; this is particularly true in view of the fact that defendants have placed $67,542.24 in mortgages upon properties in the same locality from the said Children's Fund.

(16) Among the investments in the Alimony Fund made by said defendants, your orators are informed, believe and aver are four certain mortgages as follows:

1. From Horatio S. Dumbald for $10,000, dated October 22, 1924 and recorded in the Recorder's Office of Fayette County, Pa., in Mortgage Book Vol. 175, page 1. The said mortgage by the terms thereof was payable one year from its date, but no part thereof has ever been paid, and as of December 31, 1936 interest was due thereon to a total amount of $6,111.67 and certain taxes were also unpaid.

2. A mortgage from C. O. LeClair to Elizabeth Kremer for $15,000, dated May 9, 1923, and recorded in said Recorder's Office in Mortgage Book Vol. 171, page 75. This

mortgage is payable at the rate of $3,000 per annum, beginning one year from its date, but nothing has ever been paid on said principal and as of December 31, 1936 there [fol. 235] was overdue interest thereon in the amount of $4,935. This mortgage was acquired by said Trustees on August 8, 1925.

3. Mortgage of Edward E. Weniger taken over by said Trustees from the National Bank of Fayette County on September 5, 1936, and recorded in said Recorder's Office in Mortgage Book Vol. 225, page 183, in the amount of $20,000.

4. Mortgage of George H. Bortz and Pamilla R. Bortz in the amount of $15,000, dated August 11, 1927, due July 1, 1932. Overdue interest accumulated thereon to December 31, 1936, $2,700.

(17) Your orators are informed, believe and therefore aver that said mortgages were and are unfit, illegal and unsafe investments of said trust funds and were improperly made by said Trustees and that said Trustees were and are grossly negligent in the collection of the money secured thereby and the interest due thereon; and in failing to require payment of taxes thereon.

That plaintiffs' original Bill of Complaint be further amended by substituting for the prayers for relief therein set forth the following prayers:

1. That said defendants be required to answer the averments of this Amendment.

2. That said defendants be required to restore to said Alimony Fund and to said Children's Fund the moneys lost by their illegal and negligent conduct as hereinbefore set forth.

3. That all present Trustees be removed.

4. That any and all Trustees under said deed of trust [fol. 236] be required to give bond with surety to be approved by the Court for the faithful performance of their duties.

5. For such other and further relief as the Court may deem meet and the circumstances of the case may require.

And they will ever pray.

E. H. Wicks, Attorney for Plaintiffs.

Duly sworn to by John P. Fitzgerald et al. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED BILL

We, W. W. Parshall, Andrew A. Thompson, and Robert J. Arnett, three of the Defendants, and John S. Harah, now sole administrator of G. S. Harah, Deceased, the other Defendant, for answer to the Amended Bill, or to such [fol. 237] parts thereof as we are advised it is necessary and material for us to answer, say:

1. We aver that the Court of Common Pleas of Fayette County, Sitting in Equity, has the sole and exclusive jurisdiction of each and every controversy in this action, including each and every the matters and things specifically mentioned in the Amendment, in virtue of a suit instituted in that court on October 27, 1910 at No. 618 In Equity, as it stated in detail in our Answer to the original Bill.

We hereby renew the averments of Paragraph 16 of that Answer and by reference incorporate them herein with like effect as if they were set out herein in extenso.

We further aver that on May 1, 1937 we presented a Petition to the Court of Common Pleas of Fayette County in the case above mentioned to restrain the Plaintiffs in this cause from further prosecuting this action, which remains pending in the said court.

2. We aver that Plaintiffs have not prosecuted this action with due diligence, that they are guilty of laches, and that by that laches they are barred from further prosecuting this cause.

We further aver that in June 1930 this cause was marked "Non Prossed" under the Equity Rule for failure to prosecute.

3. We believe the allegations of Paragraphs (8) of the Amended Bill to be correct.

4. We admit that among the investments in the Alimony Fund are bonds purchased by the Trustees who were acting [fol. 238] at the date of the respective purchases as follows:

10	C. Benton Cooper Rittenhouse Square, 1st mortgage bonds of a par value of	$10,000
10	Park-Lexington Corporation, 1st mortgage bonds of a par value of	10,000

5	Wetherbee Sherman Co., 1st mortgage bonds of a par value of	2,500
10	United States of Brazil 20 yr. External Gold Loan Bonds of a par value of	10,000
10	United States of Brazil 30 yr. 7% bonds of a par value of	10,000
10	Pennsylvania Operating Corp. 1st mortgage bonds of a par value of	10,000

All of the said bonds, and each and every of them, are included in an Account filed in the said proceeding in the Court of Common Pleas of Fayette County at No. 618 In Equity in 1925, and which after due notice was regularly confirmed. In like manner, each and every of the said bonds is included in an account filed in the said proceeding in 1930, to which Exceptions were filed, and remains pending in the said court.

We are not advised concerning the present market value of the said bonds.

At the times the investments were made, they were believed, after due investigation, to be good, marketable securities and safe and sound investments, but owing to the depression following 1929, they have presently gone into [fol. 239] default. Re-organizations are under way, and to what extent, if at all, there will be any loss cannot be presently determined.

Since 1915 the Trustees have from time to time made investments in similar securities, out of many of which large and substantial profits have been realized, and will be further realized, so that any loss arising out of the investments herein mentioned will be more than compensated by accretions on other bonds and securities of similar kind and character.

Princess Lida of Thurn and Taxis has been regularly furnished from time to time full accounts and reports of the investments in each of the trusts herein mentioned, and prior to the filing of the account in 1930, as herein stated, never made any objections to any of the securities in which the funds were invested, and has regularly accepted the income accruing therefrom.

5. We admit that among the investments in the Children's Fund are.

10	Pennsylvania Operating Co. Bonds of a par value of	$10,000.
10	Vanderbilt Avenue Building Corporation bonds of a par value of	10,000.
10	Republic of Columbia 6% Ext. Bonds at a par value of	10,000.
10	Tokyo Electric Light Co., Ltd. bonds of a par value of	10,000.
200	shares Pennsylvania Railroad Co. stock, the purchase price of which was	9,922.50

[fol. 240] Of and concerning the said bonds, we aver each of the facts stated in the preceding paragraph of this, our Answer, and by reference hereby incorporate the said averments herein, with like effect as if here repeated in haec verbis.

We aver that the Pennsylvania Railroad Company Stock was purchased upon the suggestion and advice of Princess Lida of Thurn and Taxis. In our judgment there will be no loss on the said stock.

6. We deny the allegations of Paragraph (11) of the Amended Bill and for further Answer, refer to the averments of Paragraph 4 of this Answer.

7. We admit the purchase of bonds of Rodgers Brown Iron Company at a cost of $24,395.00 as alleged in Paragraph (12) of the Amended Bill and that the said bonds were finally sold for $10,000.

We deny that on June 30, 1925 the then Trustees knew the said bonds to be of a market value of $20,000, and aver that at that time the then Trustees believed the bonds to be worth the full amount of the investment.

Owing to circumstances beyond the control of the then Trustees, the said bonds depreciated in value and were finally sold in good faith and in the exercise of their best judgment by the then trustees for $10,000.

For reasons fully stated in Paragraph 4 of this Answer, we deny that the Trustees, or any of them, are legally liable for the said loss.

We further aver that the accretions to said fund from like investments greatly exceed the amount of the loss here sustained, as is set out in more detail in Paragraph 4 hereof, [fol. 241] and the proceeds of the sale of said bonds are included in the Account filed in 1930,

8. We deny the allegations of Paragraph (13) of the Amended Bill, and for further answer, refer to Paragraph 4 hereof.

9. We admit that approximately $131,998.53 was invested in mortgages on real estate in and near the city of Uniontown. We aver that each of the said mortgages is a legal investment of trust funds, and that with the exception of the Dumbauld mortgage hereinafter mentioned, the value of the real estate amply secures the respective mortgages. We are not at the moment advised that any taxes on the said properties (with the exception of the Dumbauld mortgage) are in arrears, but we deny that there are any such taxes as to impair the security afforded by the said mortgages.

The said mortgage investments were in some instances made before 1925 and are included in the accounts referred to; others were made prior to 1930 and are included in the account filed in that year and already referred to; the others have been since made. The said mortgage loans have been carefully made, and in the honest belief that the properties securing the mortgage liens were of sufficient value adequately to protect the several loans.

10. We deny the allegations of Paragraph (15) of the Amended Bill, and aver that the mortgages on the real estate in Uniontown and the vicinity thereof are legitimate investment of trust funds.

In order to obtain an income of $20,000 out of the Alimony Fund it is necessary to invest, to a great extent, in securities yielding an income of 6%, and this can only be [fol. 242] done by mortgages on real estate.

11. We admit that among the investments in the Alimony Fund are the four mortgages mentioned in the Amendment, in respect of which we say:

(a) The Dumbauld mortgage is in default. The present Trustees are earnestly endeavoring to liquidate this loan. Due to the financial depression beginning in 1929 and the consequent depression in the values of real estate, it may be that there will be some loss in this behalf.

The loan when made was a legal investment of trust funds, and we deny that the Trustees, or any of them, are liable for any loss on account of this loan.

This loan and mortgage security is included in the account filed in 1925 and confirmed, and in the account filed in 1930 and still pending as herein already stated.

(b) The C. O. LaClair mortgage was acquired as a mortgage loan which was a legal investment, and in the belief that the value of the land afforded adequate security. The Trustees are making a diligent effort to liquidate this loan, and whether there will be any loss and if so to what extent, cannot now be determined.

We deny that the Trustees are liable for any loss that may be sustained on this mortgage.

This loan and mortgage security are included in the ac-
[fol. 243] count filed in 1930 in the Court of Common Pleas of Fayette County, as already averred.

(c) The mortgage of Edward E. Weniger was not taken over, as alleged in the Amended Bill, but was a loan regularly made by the Trustees. The mortgage is a legal investment for trust funds, and the property is of a value fully double the amount of the loan.

(d) The mortgage executed and delivered by George H. Bortz and wife to secure a loan of $15,000 is a legal investment of trust funds. The property is ample security, and although there is at present a default in the payment of interest, that is due to improvements and changes made in the property so as to make it income-producing.

The Trustees are giving to this loan careful attention and they anticipate good returns in respect thereof.

12. We deny that the mortgages referred to in Paragraph (17) of the Amended Bill are unfit, illegal and unsafe investments of trust funds and that they were improperly made by the Trustees. We further deny that the Trustees were and are grossly negligent in the collection of money secured thereby and the interest due thereon, and in failing to require payment of taxes thereon.

The Trustees are giving to the said mortgages and all the other investments of the said trusts constant, continuous, faithful and diligent attention, and are making no invest-
[fols. 244-245] ments without full investigation, proper appraisements, and the exercise of their best judgment.

Wherefore, having answered, Defendants pray that further proceedings in this cause be stayed until the final deter-

mination of their Petition now pending in the Court of Common Pleas of Fayette County, and mentioned in Paragraph 1 hereof, and that the Bill be ultimately dismissed.

——— ———, Administrator of G. S. Harah, Dec'd.

Jurats omitted in printing.

[fol. 246] IN UNITED STATES DISTRICT COURT

PETITION FOR RULE TO SHOW CAUSE

To the Honorable, the Judges of the District Court of the United States for the Western District of Pennsylvania:

The Petition of John Purcell Fitzgerald respectfully shows:

First. That on July 8, 1930 your Petitioner filed a Bill of Complaint in the above-entitled case praying for certain relief and that the Defendants, Andrew A. Thompson, William W. Parshall, Robert H. Arnett and John S. Harah, Administrator of G. Schell Harah, Deceased, were served with the process of this Court.

Second. That the said Defendants filed a motion to dismiss the Petitioner's Bill of Complaint, and that on the 12th day of May, 1931, this Honorable Court filed an Opin-
[fol. 247] ion overruling the Defendants' motion to dismiss the Petitioner's Bill of Complaint and permitting the cause to proceed.

Third. That on or about the 1st day of May, 1937, the Defendants filed in open Court in the Court of Common Pleas of Fayette County, State of Pennsylvania, a Petition in the case of Josiah V. Thompson et al., Plaintiffs, and Gerald Purcell Fitzgerald et al., Defendants, at No. 618 in Equity, in which they prayed the Court to restrain your Petitioner from further prosecuting the action aforesaid pending in your Honorable Court. A copy of said Petition is attached hereto, made part hereof and marked Exhibit "A".

Fourth. That the said Petition filed in the Court of Common Pleas of Fayette County, State of Pennsylvania, on the 1st day of May, 1937, a copy of which is hereto attached,

marked Exhibit "A", sets forth the same matters that were set forth in their Petition and motion to dismiss the Bill of Complaint in the above-entitled case and which was overruled by the Opinion of this Court entered May 12, 1931.

Fifth. That on the 1st day of June, 1937, the Court of Common Pleas of Fayette County, State of Pennsylvania, consisting of Hudson, P. J., and Cottom, J., entered an Order, a copy of which is hereto attached, marked Exhibit "B", whereby the said Court decreed that your Petitioner be restrained from prosecuting the above-entitled case or proceeding in any way whatever pending the disposition of a rule to show cause granted by the said Court in said Order.

Sixth. That on the 29th day of June, 1937, the Court of [fol. 248] Common Pleas of Fayette County, State of Pennsylvania, after argument on the rule to show cause, entered an Order, a copy of which is hereto attached, made part hereof and marked Exhibit "C", whereby the said Court decreed that your Petitioner be restrained from prosecuting the above-entitled case or proceeding in any way whatever.

Seventh. That the Opinion of the Court entered May 12, 1931, gave your Petitioner the right to proceed in the above-entitled case and the Defendants, Andrew A. Thompson, William W. Parshall, Robert H. Arnett and John S. Harah, Administrator of G. Schell Harah, Deceased, have answered your Petitioner's Bill of Complaint in this case.

Eighth. That your Petitioner is advised and believes that the Order of Court of the Court of Common Pleas of Fayette County, State of Pennsylvania, referred to as Exhibit "B", is null and void and is in violation of his rights under the laws and the Constitution of the United States; and is an unwarranted interference with the jurisdiction of your Honorable Court.

Wherefore, your Petitioner prays that a Decree be entered restraining Andrew A. Thompson, William W. Parshall, Robert H. Arnett and John S. Harah, Administrator of G. Schell Harah, Deceased, from further prosecuting an action in the Court of Common Pleas of Fayette County, Pennsylvania, Sitting in Equity, between Josiah V. Thompson et al., Plaintiffs, and Gerald Purcell Fitzgerald et al.,

Defendants, No. 618 in Equity, and that they be ordered [fol. 249] to withdraw the Petition and proceedings that they have filed in said case on the 1st day of May, 1937; that they pay all costs and damages incurred as the result of the filing of said Petition; and for such other and further relief as may seem just to the Court in the premises.

——— ———, Petitioner.

Jurat omitted in printing.

[fol. 250] IN UNITED STATES DISTRICT COURT

ANSWER TO RULE TO SHOW CAUSE

We, Andrew A. Thompson, Robert J. Arnett, and John S. Harah, Administrator of the estate of G. S. Harah, deceased, for and in behalf of ourselves and W. W. Parshall, co-defendant in the case styled in the caption, who on account of illness is unable to join in the signing hereof, for answer to the rule to show cause entered July 6, 1937, say:

1. We admit the allegations of the first paragraph of the petition.

2. We admit the allegations of this paragraph of the petition.

3. We admit the allegations of this paragraph of the petition.

4. We admit that the said petition, Exhibit "A", contains some of the matters set forth in our motion to dismiss the Bill of Complaint in the case styled in the caption, but allege that by reference it made the whole of the record of the cause at No. 618 In Equity in the Court of Common Pleas of Fayette County a part thereof, and that the record so incorporated in the petition includes many matters and things not stated in the said motion.

For further answer to this paragraph of the petition we say that none of the matters contained in the part of the motion referred to appeared on the face of the Bill; that the court held that the motion to dismiss was addressed to the Bill and that nothing not therein alleged could be made ground for its dismissal, and that the decree overruling the motion to dismiss did not adjudge anything of and con-

cerning the complete and exclusive jurisdiction of the Court of Common Pleas of Fayette County.

[fol. 251] 5. We admit the allegations of Paragraph fifth of the petition, but aver that they are not complete.

For further answer we say that the petition was presented on May 1, 1937 and directed to be filed, at which time it was set for argument before the court en banc on May 27, 1937, at which time it was fully argued by attorneys for petitioner and respondents before the Honorable Thomas H. Hudson, President Judge, Honorable Harry A. Cottom, Judge, and J. Frank Graff, President Judge of the 33rd Judicial District, specially presiding, whereupon the said court on June 1, 1937 directed a rule to show cause to issue, to which an Answer was filed by the Princess of Thurn and Taxis.

June 21, 1937, the date fixed in the said rule, the matter was further argued before Judges Hudson and Cottom, and on June 29, 1937 the said rule was made absolute.

We are advised and believe that Judge Graff concurred with Judges Hudson and Cottom in making absolute the said rule.

6. We admit the allegations of Paragraph sixth of the petition which in substance is embodied in the preceding paragraph of our Answer.

7. We admit that we answered the Bill, but we deny that the opinion of this court entered May 12, 1931 gave petitioner the right to proceed in this cause if the petition is intended to mean that the opinion filed May 12, 1931 adjudicated that the Court of Common Pleas of Fayette County did not have complete and exclusive jurisdiction.

8. We deny the allegations of this paragraph of the petition.

[fol. 252] Early in the month of June 1937 the Court of Common Pleas of Fayette County set July 6, 1937 as a date for a hearing on the account of respondents as trustees filed July 7, 1930 at No. 618 In Equity, to which certain exceptions were filed, which account was filed prior to the filing of the Bill in this cause, and embraces all of the issues raised in the original Bill in this cause. The said hearing was continued to July 20, 1937, at which time it will proceed.

9. For further answer we refer to the averments of our motion to dismiss the Bill relating to the jurisdiction of

the Court of Common Pleas of Fayette County, Sitting in Equity, and the part of our Answer relating to the jurisdiction of the said court, with like effect as if set out herein in detail.

10. We further aver that the record of the Court of Common Pleas of Fayette County, Sitting in Equity, at No. 618, shows that court to have complete and exclusive jurisdiction of all the controversies involved in this cause.

11. For further answer we aver that the Court of Common Pleas of Fayette County has jurisdiction to hear and determine this cause and in connection therewith to decide all questions relating to its jurisdiction, and whether or not its jurisdiction is exclusive.

We say further that the said court in the exercise of its undoubted jurisdiction has determined that such jurisdiction is complete and exclusive and that its decision in that behalf cannot be reviewed otherwise than by an appeal taken [fol. 253] from that court to the Supreme Court of Pennsylvania and thence to the Supreme Court of the United States.

We further say that the petition is in substance and effect an attempt to review in this court the prior decision of the Court of Common Pleas of Fayette County, Sitting in Equity, and to annul and set it aside, and that this court is without jurisdiction to entertain such a proceeding.

We aver that an appeal from the decree of the Court of Common Pleas entered June 29, 1937, referred to in the petition, has been taken to the Supreme Court of Pennsylvania, and there remains pending.

Wherefore, having answered, we pray that the petition may be dismissed.

——— ———, Administrator of G. S. Harah, Deceased.

Jurats omitted in printing.

[fol. 254] IN UNITED STATES DISTRICT COURT

OPINION ON PLAINTIFFS' MOTION FOR A RESTRAINING ORDER AGAINST DEFENDANTS

SCHOONMAKER, Judge:

John Purcell Fitzgerald, one of the plaintiffs, has filed in this Court a petition asking that the defendants in this

case be enjoined from further prosecution of an action which they brought against the plaintiffs in the instant case in the Court of Common Pleas of Fayette County, Pennsylvania, to enjoin the plaintiffs herein from the further prosecution of this suit. The proceedings were filed in a [fol. 255] then pending suit in the Court of Common Pleas of Fayette County between Josiah V. Thompson et al., plaintiffs, and Gerald Purcell Fitzgerald et al., defendants, at No. 618 In Equity, and were based on the allegation that the Court of Common Pleas of Fayette County has sole and exclusive jurisdiction over the matters which the plaintiffs in the instant case are seeking to litigate in the instant suit.

The defendants in the instant case raised the same jurisdictional question by a motion to dismiss the bill of complaint herein. After argument of this motion, we filed an opinion on May 12, 1931, holding that it was not apparent from the face of the bill that the Court of Common Pleas of Fayette County had acquired, and still retain sole and exclusive jurisdiction of the controversies sought to be litigated in the instant case, and that, therefore, this matter of jurisdiction could be determined only after answer and proofs. (See our opinion filed herein on May 12, 1931).

Whereupon, on May 18, 1931, defendants answered the bill of complaint averring, among other things, that the matter in controversy was within the sole and exclusive jurisdiction of the Court of Common Pleas of Fayette County.

The case has never been set down for trial, but on April 17, 1937, plaintiffs filed an amendment to the bill of complaint, and on May 5, 1937, defendants filed an answer to the amended bill. The case is now at issue on the amended bill and the amended answer.

The injunction proceedings against the plaintiffs in the instant case were filed in the Court of Common Pleas of [fol. 256] Fayette County on May 1, 1937, and resulted in that court issuing an order on June 29, 1937, enjoining the plaintiffs in the instant case from further prosecuting the same.

We have not yet decided the question of our jurisdiction, and are of the opinion that the plaintiffs in the instant suit are entitled to have that question settled by this Court. Of course, if the Court of Common Pleas of Fayette County, Pennsylvania, first obtained sole and exclusive jurisdiction

over the matters sought to be litigated in the instant suit, we ought to, and shall yield jurisdiction to that court. But we cannot so find until we have heard the parties on bill, answer, and proofs with reference to the jurisdictional question. This case has been on our records for a long time without being brought to trial. Whether this is the fault of the plaintiffs or of the defendants, we do not know. However, we shall now set the case down for trial solely on the jurisdictional issue for Monday, the eighth day of November, 1937, at ten o'clock A. M.

In the meantime, and until the hearing by this court on the jurisdictional issue, and the decision of this court on that issue, we shall enjoin the defendants from further prosecuting the action in the Court of Common Pleas of Fayette County, Pennsylvania, or from proceeding by injunction or otherwise to prevent the plaintiffs from having the jurisdictional issue tried out in this Court.

An order may be submitted accordingly.

[fol. 257] IN UNITED STATES DISTRICT COURT

ORDER ENJOINING DEFENDANTS

And now, to-wit, this 18th day of September, 1937, upon consideration of Plaintiffs' Petition filed in this case, and after argument in open court, it is hereby decreed and ordered as follows

That the Defendants and each of them be, and hereby are enjoined from further prosecuting the action at No. 618 In Equity in the Court of Common Pleas of Fayette County, Pennsylvania to restrain Plaintiffs in the case at bar from proceeding further in the case at bar, and that the Defendants be and hereby are enjoined from preventing or attempting to prevent by injunction or otherwise, the Plaintiffs from having the jurisdictional issue tried in this Court, said hearing on the jurisdictional issue to be heard Monday, the eighth of November, 1937, at ten o'clock A. M.

Per Curiam, S.

Same day, defendants except and exception noted.

F. P. Schoonmaker, Judge.

[fol. 258] MARCH TERM, 1937

No. 172

JOSIAH V. THOMPSON et al., Plaintiffs,

vs.

GERALD PURCELL FITZGERALD et al., Defendants

Appeal of LIDA, Princess of Thurn and Taxis and JOHN PURCELL FITZGERALD

DOCKET ENTRIES

Appeal from Decree of Court of Common Pleas of Fayette County at No. 618. In Equity

July 3, 1937. Appeal and affidavit filed and writ exit.
July 8, 1937. Appearance for Appellees filed.
Sept. 24, 1937. Record filed.
Sept. 27, 1937. Petition by appellants for continuance filed.
Sept. 27, 1937. Petition by A. A. Thompson et al. that suit be heard at present session or be non- prossed, filed.

Order

Now Sept. 27th, 1937 Return day extended to first Monday of December 1937.

Per Curiam.

Sept. 29, 1937. Order in usual form permitting Walter P. Smart to remove record and to retain same until Oct. 15/37, filed.
Oct. 7, 1937. Order in usual form permitting Dean D. Sturgis to remove record and to retain same until Oct. 18/37, filed.
Oct. 16, 1937. Petition by attorneys for appellees for advancement to Nov. sitting at Phila. filed.
Oct. 30/37. Answer to petition to advance filed.

Order

Nov. 5th, 1937. Argument advanced to the week of Jany. 10th, 1938, at Philadelphia, Pa.

Per Curiam.

[fol. 259] Nov. 8, 1937. Transferred to Philadelphia.

Dec. 21, 1937. Order in prescribed form by Drew, J., permitting Walter P. Smart to take out record for printing and to retain till Jany. 3, 1938.

Dec. 31, 1937. Petition by appellants for continuance to March Term at Pittsburgh filed.

Dec. 31, 1937. Acceptance of service of notice of filing petition, dated Dec. 29/37, filed.

Order

January 3rd, 1938. Petition refused.

Per Curiam.

Jan. 5, 1938. Assignments filed.

January 11, 1938. Argued.

Decision

Mar. 21, 1938. The order of the court below making absolute the rule of the trustees to show cause why appellants should not be enjoined and restrained from prosecuting the suit in equity in the District Court of the United States for the Western District of Pennsylvania is affirmed; costs to be paid by appellants.

Stern, J.

April 1, 1938. Remitted.

May 9, 1938. Praecipe for Supplemental Certiorari filed.

May 9, 1938. Writ exit.

May 13, 1938. Record returned.

May 25, 1938. Appellants' Praecipe for certification of record to United States Supreme Court filed.

[fol. 260] Assignment of Error

The court erred in making absolute the rule to show cause why defendant should not be restrained from prosecuting a certain action in the United States District Court, said rule, decree of court and exception to said decree being as follows (p. 174 a):

"Order

"And Now, June 1st, 1937, the within Petition presented in Court, and after and upon due consideration, it is

ordered, adjudged and decreed that a rule issue directed to Princess Lida of Thurn and Taxis and John Purcell Fitzgerald, commanding them to show cause why they should not be restrained from prosecuting an action instituted by them against Petitioners in the District Court of the United States for the Western District of Pennsylvania, at No. 2451 in Equity, returnable in fifteen (15) days after service, and hereby it is further ordered, adjudged and decreed that the said Princess Lida and John be and hereby they are restrained from prosecuting said action or proceeding in any way whatever, pending the final disposition of the said rule.

By the Court,

J. H. H. H. A. C."

(164 a)

Attest: John J. Brady.

[fol. 261] "Decree Making Absolute Rule to Show Cause

"A petition of the Trustees of the funds held in virtue of the decrees heretofore entered in this cause, praying to restrain Princess Lida of Thurn and Taxis and John Fitzgerald, two of the Plaintiffs in this cause, from prosecuting a certain action in equity in the District Court of the United States for the Western District of Pennsylvania, having been presented on May 1, 1937, at which time May 27, 1937 was fixed as a time for argument, and the said argument having been had at the time fixed before the Court en banc, at which argument counsel for Respondents were heard at length, and a rule to show cause why a restraining order should not be entered having issued and an answer having been filed, and a further hearing and argument having been had before the Court en banc on June 21, 1937, and the Court being of opinion that it has complete and exclusive jurisdiction, it is now

"June 29, 1937, ordered, adjudged and decreed that the rule to show cause be and hereby it is made absolute, and that Lida, Princess of Thurn and Taxis and John Fitzgerald, two of the Plaintiffs in this cause, be and hereby they and each of them are enjoined and restrained from prosecuting a certain suit in equity in the District Court of the United States for the Western District of Pennsylvania at No. 2451 In Equity, wherein the said Lida and John are

Plaintiffs, and W. W. Parshall, A. A. Thompson, R. J. [fol. 262] Arnett, and John S. Harah, Administrator of G. S. Harah, Deceased, as Trustees of the funds herein mentioned, are Defendants.

"Thomas H. Hudson, President Judge.

(174 a).

"Attest: John J. Brady, Prothy."

"Order

"And now, June 29th, 1937, at the instance of defendants, an exception is noted and a bill is sealed.

"Thomas H. Hudson, President Judge. (Seal.)

(175 a)

"Attest: John J. Brady, Prothonotary."

[fol. 263] In the Supreme Court of Pennsylvania; Western District, March Term, 1937

No. 172

Josiah V. Thompson, Trustee, et al.

v.

Gerald Purcell Fitzgerald, Individually and as Trustee, et al.

Appeal of Lida, Princess of Thurn and Taxis (Hungary), and John Purcell Fitzgerald

Appeal from Decree of Court of Common Pleas of Fayette County at No. 618. In Equity

Opinion of the Court

Filed Mar. 21, 1938

Stern, J.:

In 1899 Lida Eleanor Nicols, a resident of Uniontown, was married to Gerald Purcell FitzGerald. Of the union were born three children, John, Edward and Gerald. In 1906 husband and wife instituted divorce proceedings

against one another, and by agreement dated December 6, 1906, executed by them, Josiah V. Thompson and Charles E. Lenhart, and recorded in Fayette County, FitzGerald covenanted that after dissolution of the marriage he would pay to Thompson, Lenhart and himself, as trustees, (1) so much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company—partnerships operating in Fayette County and composed of FitzGerald and Lenhart—as would yield an annuity of $15,000 per annum for three years and thereafter $20,000 per annum, to be paid to his wife for life; (2) one-third of his share of the annual profits, to be invested until there should accumulate the sum of $300,000, one-half of the income therefrom to be paid to his wife for life, and the other half either to accumulate or to be expended for the benefit of the children; or the trustees, in their discretion, might pay the entire income to his wife until the eldest child attained the age of [fol. 264] twenty-one years; as each child became twenty-one he was to receive his share of the income as of right, and on the death of the wife and after the youngest child had attained the age of twenty-one the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children. The agreement provided that in the event of the death or resignation of any of the trustees the two remaining should appoint a successor, or on their failure to do so either of them, and also the wife, should have the right to petition the Court of Common Pleas of Fayette County to fill the vacancy. The wife agreed to relinquish all rights of dower and alimony, and there were provisions for the custody and control of the children.

The marriage was dissolved by Act of Parliament in 1907, and the stipulated payments were duly made until 1910. In that year a bill in equity was filed in the Fayette County court by Thompson as trustee, Mrs. FitzGerald, and the three children by their guardian ad litem, against FitzGerald and Lenhart as trustees, FitzGerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the court to remove FitzGerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust agreement and instruct the trustees accordingly, to require FitzGerald and Lenhart, as members of the partnerships, to

account for and pay into the trust, or to a sequestrator or receiver to be appointed by the court, the proper share of FitzGerald's profits and make such subsequent accountings as might be necessary during the term of the agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies. Answers were filed to the bill. That of FitzGerald asked, by way of counter relief, that the agreement of 1906 be declared null and void, that Thompson be ordered to account to the trust for moneys re- [fol. 265] ceived by him and be removed from his office as trustee of the fund for the children. The suit culminated in 1911 in a decree which—affirmed on appeal to this court, 233 Pa. 242—ordered defendants to pay the amounts then remaining due under the agreement, adjudged the payments stipulated in the agreement to be a lien on FitzGerald's interest in the real estate owned by Fayette Coke Company, removed FitzGerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee, and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000 should have been accumulated in the fund for the children.

In place of FitzGerald, William M. Thompson was appointed a trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed in his stead. In that same year Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Fayette County court alleging that disputes had arisen between them and FitzGerald in regard to the proper construction of the agreement as to the profits of Fayette Coke Company, and that an agreement had been reached whereby FitzGerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during a period of seven years, aggregating the sum of $400,000, these payments to be secured by a mortgage to the trustees of FitzGerald's undivided interest in the real estate of the Fayette Coke Company. The payments were to be invested by the trustees, and the net income, together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000, or such part thereof as had then accumulated, was to be returned to FitzGerald and the mortgage satisfied. The petition prayed the court to modify the decree of 1911

so as to permit this new agreement to become effective. Ac-
[fol. 266] cordingly the court entered such a decree.

In 1918 the resignation of Josiah V. Thompson, and in 1919 that of Lenhart, was presented to the court and it was ordered that they be discharged from further accountings. Their places were supplied by G. S. Harah and Andrew A. Thompson, these appointments being approved and confirmed by the court. In 1925 the trustees, Harah, Andrew A. Thompson and Parshall, filed their first and partial account, which was duly advertised and confirmed. On July 7, 1930, a second and partial account of the trust was filed, this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died. Robert J. Arnett was appointed to succeed Harah and his appointment was confirmed by the court.

The present controversy started with the filing of a bill in equity in the District Court of the United States for the Western District of Pennsylvania, on July 8, 1930, by Mrs. FitzGerald, who by remarriage had become Princess Lida of Thurn and Taxis and a citizen of Hungary, together with her eldest son John, then a citizen of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, the deceased former trustee, all citizens of Pennsylvania. The bill alleged that there was then in the wife's alimony fund upwards of $456,000, and in the children's fund upwards of $315,000, part of these sums including undistributed income, that among the investments in the alimony fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments of trust funds improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the trust estate, had failed to render proper accounts, and were not fit persons to act as trustees. The bill prayed that the trustees be required to file an account, that they be removed as
[fol. 267] trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties. After a motion to dismiss the bill was denied by the District Court, the trustees filed an answer alleging that the mortgages complained of were lawful investments, denying the allegations as to losses, mismanagement of the estate and a failure to render ac-

counts, and declaring that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed in the Fayette County court in 1925, and that another account, filed July 7, 1930, was then awaiting confirmation in that court.

Nothing further was done in the equity proceeding in the federal court for several years. In April, 1937, the complainants there filed an amendment to their bill, specifying certain bonds and mortgages in the trust funds which they asserted were illegal investments, and alleging that the amount of the funds invested in mortgages on properties in Uniontown was too great. For the prayer of the original bill asking for the filing of an account there was substituted one that the trustees be required to restore to the funds "the moneys lost by their illegal and negligent conduct." To the amended bill the trustees filed an answer stating that practically all the bonds and mortgages challenged by the complainants had been included in the account filed in the Fayette County court in 1925, or in that filed in 1930, or in both, that to the latter account exceptions had been filed and were pending in that court, that, while losses had occurred in some of the investments, accretions on others more than compensated therefor, and that the criticisms made of the specified investments were not justified.

Meanwhile, on May 1, 1937, the trustees had filed a petition in the Fayette County court setting forth that the prosecution of the suit in the federal court constituted [fol. 268] an interference with the exclusive jurisdiction of the state court, and praying for a decree restraining the Princess and her son John from further prosecution of that action. A rule to show cause why the restraining order should not issue was allowed. The Princess filed an answer alleging that the county court never had control and possession of the trust funds, that there was no controversy there pending when the bill in equity was filed in the District Court, and that the accounts filed by the trustees were ex parte proceedings, and denying that the state court had exclusive jurisdiction over the subject-matter of the suit in the federal court. On June 29, 1937, the Fayette County court made the trustees' rule absolute, and entered a decree enjoining the Princess and John Fitz-Gerald from prosecuting the equity suit in the federal court. The present appeal, taken on July 6, 1937, is by the Princess

and her son from that decree of the court below. At the same time John FitzGerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County. After an answer was filed by the trustees, the District Court, on September 18, 1937, made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition. On July 19, 1937, the trustees had filed in the Fayette County court a third and partial account of the two funds in the trust, to which exceptions were filed; testimony was also taken on the exceptions to the second account. The hearing fixed by the District Court was duly had, but no decision has thus far been rendered by that Court.

In Peck v. Jenness, 48 U. S. 612, 624, 625, it was said: "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and * * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once [fol. 269] attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." The present case is a concrete embodiment of these apprehended possibilities. An impasse exists as the result of each of two courts enjoining parties litigant from proceeding in the other.

The federal court, having all the equity jurisdiction possessed by the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, undoubtedly could have entertained the bill filed by appellants had there been no antecedent proceedings in the state court. The present question is whether, in view of those proceedings, the Fayette County court had obtained a jurisdiction over the subject-matter which precluded action in any other court.

It is firmly settled that a prior suit in a state or federal court which does not deal, either actually or potentially, with specific property or objects, and in which nothing more than

a personal judgment is sought, not only does not prevent another suit from being brought for the same cause in the court of the other jurisdiction, but does not even furnish ground for a plea in abatement to the second action: Stanton v. Embrey, 93 U. S. 548; Gordon v. Gilfoil, 99 U. S. 168; Kline v. Burke Construction Co., 260 U. S. 226; Merritt v. American Steel-Barge Co., 79 Fed. 228, 232; W. E. Stewart Land Co. v. Arthur, 267 Fed. 184; Holmes County, Miss. v. Burton Construction Co., 272 Fed. 565. In such a case the first court in which suit was instituted is not ousted of its jurisdiction, nor delayed or obstructed in its exercise thereof, nor is there any resulting conflict of authority. If a judg-[fol. 270] ment is rendered in the second action before the first is tried, it will support a plea of res adjudicata in the first suit if the issue and the parties are the same.

In actions in rem the law is otherwise. "It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem, the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction": Kline v. Burke Construction Company, 260 U. S. 226, 229. In such cases, therefore, the rule is that the court which first acquires jurisdiction of specific property by the possession thereof, or by the commencement of a suit from which it appears that it is necessary to a determination of the controversy, or to the enforcement of the prospective judgment or decree, for the court to have control and dominion over the property, thereby withdraws it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and the court is entitled to retain such control as is requisite to effectuate its final judgment or decree free from the interference of every other tribunal. "The res is as much withdrawn from the judicial power of the other [court] as if it had been car-

ried physically into a different territorial sovereignty": [fol. 271] Covell v. Heyman, 111 U. S. 176, 182. The tribunal whose jurisdiction first attaches "holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted": Taylor v. Taintor, 83 U. S. 366, 370.

In Byers v. McAuley, 149 U. S. 608, where a decedent's estate was being administered in an orphans' court, the United States Supreme Court reversed the decree of a federal Circuit Court which directed the administrator of the estate to file an account and formulated a schedule of distribution. The court said (pp. 612, 620): "It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate. * * * The decree as a whole cannot be sustained, unless upon the theory that the Federal court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum. * * * Our conclusion * * * is that the Federal court erred in taking any action or making any decree looking to the mere administration of the estate. * * *"

"The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired. * * * The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. * * * The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit [fol. 272] is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* [italics supplied], or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation,

the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end without interference or hindrance on the part of any other court": Merritt v. American Steel-Barge Co., 79 Fed. 228, 231.

In Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co., 177 U. S. 51, it was held that where a Circuit Court of the United States had obtained jurisdiction of a bill to foreclose a corporate mortgage, a state court could not thereafter entertain proceedings for the removal of the trustee under the mortgage, the appointment of a new trustee, and the enjoining of the foreclosure proceedings. The Supreme Court said (p. 61): "The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being displaces other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." And the court then proceeded with the same phraseology as in the opinion last quoted: "Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts,* [italics supplied] or liqui- [fol. 273] date insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts." This same language was quoted in Palmer v. State of Texas, 212 U. S. 118, 129.

In Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, the doctrine of Byers v. McAuley, supra, was reaffirmed and applied, the court saying (p. 45): "In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, * * * for it is the result of the cases that in so far as the proper administration of the

estate is concerned in the payment of debts and the settlement of the accounts by the executor or administrator the jurisdiction of the probate court may not be interfered with."

Nor is it necessary, for the rule to apply, that the first court must have actual possession of the res involved in the litigation. In Amusement Syndicate Co. v. El Paso Land Improvement Co., 251 Fed. 345, suit was brought in a state court to compel the removal of certain structures upon land. A temporary injunction was issued. It was held that the federal court could not thereafter entertain a petition involving the same subject-matter, the court saying (p. 348): "If these proceedings have not brought the specific property involved—the res—into the actual possession of the state court, they have at least given that court dominion and control over it. It is true that injunction acts only in personam; but it is also true that possession of specific property may be, and often is, effected by and through injunctive process. These considerations I think clearly distinguish this case from one strictly in personam, where only a personal judgment is in view, and brings it within the rule that as between two courts of concurrent jurisdiction the one which gets the case first holds it to the exclusion of the other."

The res, priority of jurisdiction over which makes such]fol. 274[jurisdiction exclusive, need not consist of a specific property or anything tangible, but may be merely a status, such as marriage, or the probate of a will. The test, as already stated, is not possession of the property, but jurisdiction over the res: Dennison Brick & Tile Co. v. Chicago Trust Co., 286 Fed. 818, 820. So in Brown v. Pacific Mutual Life Ins. Co., 62 Fed. (2d) 711, it was held that where a suit was instituted in a federal court to obtain the rescission and cancellation of a policy of life insurance, a subsequent action in a state court to recover on the policy was properly enjoined.

In Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, it was said (p. 195): "Where the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. * * * But if the two suits

are *in rem*, or *quasi* [italics supplied] *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. * * * The principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

Apparently the latest expression by the Supreme Court of the United States upon the principle here involved is that in the case of United States v. Bank of New York & Trust Co., 296 U. S. 463, where the court said (p. 477): "In both these cases the proceedings in the state court were quasi in rem. Control of the funds was essential to the exercise of [fol. 275] the court's jurisdiction to protect the rights of claimants. * * * The Principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, *administer trusts* [italics supplied], or liquidate estates, and in suits of a similar nature, where to give effect to its jurisdiction, the court must control the property. * * * If the two suits are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. * * * This principle is applied in the discharge of the long recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States.'"

It is true, as held in many cases,* that where the action brought in the federal court is merely to establish an inter-

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* Suydam v. Broadnax, 39 U. S. 67; Green's Administratrix v. Creighton, 64 U. S. 90; Yonley v. Lavender, 88 U. S. 276; Byers v. McAuley, 149 U. S. 608; Security Trust Co. v. Black River National Bank, 187 U. S. 211; Water-

est or right to share in property being administered in a state court, it may properly be prosecuted, since a judgment in such a suit would not disturb the control of the state court over the fund or estate as to which it had taken jurisdiction. There is, however, a limitation that the exercise of such jurisdiction of the federal court does not include the power to draw to it the administration of the estate or to interfere in any way with its management or [fol. 276] control. "Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution": Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U. S. 613, 619.

In the present case there is not involved any controversy as to the right of appellants to participate, or the extent of their interest, in the trust funds which, for more than twenty-seven years, have been administered under the direction and control of the Common Pleas Court of Fayette County. The relief sought by them in the federal court under their amended bill of complaint is to require the trustees to restore to the funds moneys alleged to have been lost by their illegal and negligent management of the trust, to remove them as trustees, and to make all trustees under the deed of trust give bond with surety for the faithful performance of their duties. Such relief is concerned exclusively with the administration of the trust. It is, of course, true that the trust res is not in the possession of the Fayette County court as would be property in a receivership, but it seems reasonably clear that the administration of a trust falls properly within the class of cases governed by the principle giving to the court first assuming jurisdiction in proceedings quasi in rem the exclusive right to determine questions of administration and management, as distinguished from the adjudication of individual rights and interests in the res. Not only do the authorities previously quoted specifically include trust administration in their statement of the rule, but, what is of chief importance, the

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man v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33; Riehle v. Margolies, 279 U. S. 218; Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U. S. 613; General Baking Co. v. Harr, 300 U. S. 433; Harrison v. Monoravie, 264 Fed. 776; Commonwealth Trust Co. of Pittsburgh v. Atwood, 78 Fed. (2d) 92.

reason underlying the rule applies forcibly to trust estates. In the present case the appointment of all the successive trustees was either made or confirmed by the state court. One of their accounts has been confirmed by that court, and two others have been filed and are there pending, exceptions having been taken to them. In exercising jurisdiction over a trust estate a court may frequently be obliged to [fol. 277] make orders concerning even the physical custody and safekeeping of specific items of the trust property, or authorizing or directing their sale and the making of reinvestments; one order of the court below in the present case, under date of November 6, 1933, directed the trustees to deposit certain bonds under a corporate reorganization plan for conversion into new debentures. An accounting by fiduciaries is in itself a proceeding quasi in rem, in the sense that it not only adjudicates the legality of the investments constituting the trust, but also, if it results in a surcharge, orders payment and restoration of moneys to the trust fund, that is to the res. Such a surcharge is not a judgment to pay money to individuals as in an ordinary personal action. Thus if appellants were successful in the proceedings under their bill in equity no judgment would or could be rendered for payment to them of any money; there could be merely an order for restitution to the trustees themselves as continuing trustees or to their successor trustees; in other words, the recovery would be by the trust fund and not by appellants, who can gain therefrom only upon distribution of the income and ultimately of the corpus of the trust, as prescribed in the agreement by which it was created.

The line of distinction between proceedings in personam and those in rem to determine whether or not the jurisdiction acquired by the court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a court has made or confirmed the appointment of trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process [fol. 278] of investigation and adjudication by the first

court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition. As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the federal court were contained in the account audited and confirmed by the county court in 1923 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different courts, but the same account could be audited simultaneously by two courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees.

The order of the court below making absolute the rule of the trustees to show cause why appellants should not be enjoined and restrained from prosecuting the suit in equity in the District Court of the United States for the Western District of Pennsylvania is affirmed; costs to be paid by appellants.

[fol. 279] I, John W. Kephart, Chief Justice of The Supreme Court of Pennsylvania, Do Certify, that Pier Dannals was at the time of signing the annexed attestation and now is Prothonotary of the said The Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In Witness Whereof, I have hereunto subscribed my name this sixth day of June in the year of our Lord one thousand nine hundred and thirty-eight.

John W. Kephart.

I, Pier Dannals, Prothonotary of The Supreme Court of Pennsylvania in and for the Western District, Do Certify, that the Honorable John W. Kephart, by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of The Supreme Court of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this sixth day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

Pier Dannals. (Seal of the Supreme Court of Pennsylvania.)

[fol. 280] CERTIFICATE OF RECORD

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, Pier Dannals, Prothonotary of the supreme court of Pennsylvania, for the Western District thereof, Do Hereby Certify that the foregoing Record, pages 1a to 257a inclusive 1b to 21b inclusive *inclusive*, is a true and faithful copy of the Record and Proceedings of The Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein Josiah V. Thompson, Trustee, et al. are plaintiffs and Gerald Purcell Fitzgerald, individually and as Trustee, et al. are defendants, and Lida, Princess of Thurn and Taxis (Hungary), and John Purcell Fitzgerald, are appellants.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this sixth day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

Pier Dannals, Prothonotary. (Seal of the Supreme Court of Pennsylvania.)

[fol. 281] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,603. Pennsylvania Supreme Court. Term No. 118. Princess Lida of Thurn and Taxis, formerly Lida Eleanor Purcell Fitzgerald, and John Purcell Fitzgerald, petitioners, vs. Gerald Purcell Fitzgerald, Individually and as Trustee of the Trusts hereinafter described, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed June 14, 1938. Term No. 118, O. T., 1938.

(8046)

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 14 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1938

No. 118

JOSIAH V. THOMPSON as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*

Plaintiffs

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as Trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company, CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company

Defendants

PETITION OF PLAINTIFFS PRINCESS LIDA OF THURN AND TAXIS, FORMERLY LIDA ELEANOR PURCELL FITZGERALD, AND JOHN PURCELL FITZGERALD, FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF

CHARLES H. TUTTLE and
GERALD J. CRAUGH
15 Broad Street
New York, N. Y.

and

R. MURRAY GIBSON, JR.
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Pittsburgh, Pa.

Counsel for Petitioners

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IN THE

Supreme Court of the United States

October Term, 1938

No.

JOSIAH V. THOMPSON as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*,

Plaintiffs,

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as Trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company; CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

PETITION OF PLAINTIFFS PRINCESS LIDA OF THURN AND TAXIS, FORMERLY LIDA ELEANOR PURCELL FITZGERALD, AND JOHN PURCELL FITZGERALD, FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of plaintiffs Princess Lida of Thurn and Taxis (formerly Lida Eleanor Purcell Fitzgerald), a citizen of Hungary, and John Purcell Fitzgerald, a citizen of New York, respectfully shows:

Your petitioners seek review of a final decree of the Supreme Court of Pennsylvania (329 Pa. 497; 198 Atl. 58) entered in the above-entitled action on March 21, 1938, affirming a decree (174a) of the Court of Common Pleas of Fayette County, Pennsylvania (hereafter called "the State Court"), which enjoined your petitioners from further prosecuting their action in the United States District Court for the Western District of Pennsylvania (hereinafter called "the Federal Court").

The Supreme Court of Pennsylvania held that the action before it and the Federal action involve the same subject matter and are actions *in rem* or *quasi in rem*, and that the State Court has exclusive jurisdiction because the State action was commenced prior to the Federal action.

On the very same day (March 21, 1938) on which the Supreme Court of Pennsylvania rendered its opinion, the Federal Court rendered also its opinion (not yet reported, but printed in Appendix A hereto), *arriving at a decision exactly contrary to the decision of the Supreme Court of Pennsylvania.* It held that the action in the State Court was an action *in personam*, that it had been terminated, and that in any event the State Court should not enjoin prosecution of the Federal Court action.

The action in the State Court was commenced October , 1910. Your petitioners contend that it was terminated ot later than May 25, 1925.

The action in the Federal Court is entitled "*Princess ida of Thurn and Taxis etc., et al.* v. *Andrew A. Thompon et al.*" and bears No. 2451 in Equity. This action as commenced July 8, 1930.

STATEMENT

The Trust Agreement

On December 6, 1906, an agreement (17a) was made etween Gerald Purcell Fitzgerald of the Island of Waterord, Ireland, of the first part; his wife, Lida Eleanor urcell Fitzgerald (now Princess Lida of Thurn and axis), of the second part; and Josiah V. Thompson, harles E. Lenhart, and said Gerald Purcell Fitzgerald, trustees, of the third part.

The agreement recites that Lida and Gerald were married in the year 1899; that they had the following children, John Purcell Fitzgerald, Edward Maurice Fitzerald, and Gerald Purcell Fitzgerald; and that on December 5, 1906, Lida divorced Gerald by decree of the High ourt of Justice in Ireland.

The agreement provides:

(1) For payments of alimony by Gerald to Lida, pending the absolute divorce which was eventually granted (44a); and for payments thereafter by Gerald to the trustees, for the benefit of Lida and the children, out of his profits from his nine-tenths interest in two partnerships, Fayette Coke Company and Shamrock Supply Company (16a-17a).

(2) Out of these profits Gerald is to pay to the trustees (a) for the benefit of Lida, an annuity of $15,000 for the first three years and $20,000 per year thereafter (18a), and (b) the difference between such annuity and one-third of his share of such profits until a fund of $300,000 shall be created (19a). Beginning February 1, 1908, and annually thereafter the income from such fund of $300,000, or from so much thereof as shall have been received and invested by the trustees, is to be paid to Lida and the children as therein provided (20a).

(3) Upon the death of Lida and the children, the principal of such fund shall be paid by the trustees to Gerald or his estate (20a-21a).

(4) Where a vacancy in the office of trustee occurs such vacancy is to be filled by the surviving trustees (21a).

This agreement was performed until June, 1910, when Gerald repudiated it (89a).

The State Court Action to Compel Performance

On October 27, 1910, a bill in equity was filed in the State Court by the other parties to the agreement to compel Gerald to perform and to remove him and Lenhart as trustees (15a).

State Court Decree of March 15, 1911

On March 15, 1911, the State Court entered its decree (141a), (1) directing that Gerald pay to the trustees the arrears under the agreement, (2) directing that the

agreed payments be a lien on Gerald's interest in the real property of Fayette Coke Company and Shamrock Supply Company, (3) removing Gerald as a trustee, (4) appointing a referee to take his account and granting judgment for the amount found due, (5) directing the two remaining trustees to appoint a third, (6) enjoining Gerald from disposing of his interest until the aforesaid fund of $300,000 had been accumulated, and (7) directing that Gerald pay the costs (141a-143a).

Lenhart was not removed.

Modifying Decree of March 5, 1915

On March 5, 1915 (151a), the State Court entered a modifying decree. This provided that Gerald shall assign to the trustees his nine-tenths interest in the sinking fund of Fayette Coke Company, amounting up to $88,783.20, which sum is to be used in payment of the arrears up to January 1, 1915 of $10,242.12 on the annuity to Lida and in payment of $78,491.08 toward the accumulation of a fund of $400,000, to be created for the purpose of insuring payment of said annuity of $20,000 to Lida. The modifying decree further provides that Gerald pay the sum of $321,508.92 (the balance of such fund of $400,000) to the trustees within seven years from January 1, 1915, such payment of $321,508.92 to be made out of a sinking fund to be provided by Gerald, and to be secured by a mortgage on Gerald's interest in the property of Fayette Coke Company (151a-154a).

Both State Court Decrees Fully Satisfied

The separate funds of $300,000 and $400,000 required to be created under the decrees of March 15, 1911 and March 5, 1915 were fully created and accumulated on or before May 25, 1925, and all that Gerald was required to do under them was done by him.

Both decrees were satisfied before the commencement of the Federal Court action (181a, 192a, 206a, 215a, 229a, 230a, 237a). In their brief in the Supreme Court of Pennsylvania, the trustees asserted that Gerald *"has made payment in full of all sums required by the original contract by him to be made"* (p. 49).

On June 3, 1925, prior to the commencement of the Federal Court action, the trustees filed in the State Court a satisfaction dated May 25, 1925, acknowledging the payment by Gerald of all sums of money which he was required to pay by any decree entered in the State Court action, and in consideration thereof satisfying said decrees in full of debt, interest and costs. (Opinion of SCHOONMAKER, *J.*, Appendix A, and copy of satisfaction, Appendix B hereto.)

The Federal Court Action

On July 8, 1930, your petitioners, as beneficiaries under the agreement of December 6, 1906, filed their bill of complaint in the Federal Court against the present trustees, Andrew A. Thompson, William W. Parshall and Robert H. Arnett, and the administrators of the Estate of G. S. Harah, deceased, a former trustee, alleging mismanagement of the trust funds, and praying that the

trustees be removed and that the defendants be made to account and to repay the losses (188a).

On July 29, 1930, the trustees filed a motion in the Federal Court to dismiss this bill of complaint for absence of indispensable parties, and because the State Court, by virtue of the aforesaid proceedings in the State Court, had exclusive jurisdiction of the controversy sought to be litigated in the Federal Court (195a).

On May 12, 1931, the Federal Court rendered its opinion denying this motion to dismiss and refusing to decide whether or not the State Court had exclusive jurisdiction until after answer had been filed and proof ordered (208a).

On May 18, 1931, the defendants filed their answer averring, *inter alia*, that the controversy was within the exclusive jurisdiction of the State Court (213a).

On April 17, 1937, your petitioners filed an amendment to the bill of complaint in the Federal Court action (230a), and on May 5, 1937, the trustees filed their answer thereto (236a).

Proceedings in State Court to Restrain Prosecution of Federal Court Action

On May 1, 1937, the trustees filed a petition in the State Court (159a) wherein they prayed that your petitioners be temporarily enjoined, and show cause why they should not be permanently enjoined from further prosecuting the Federal Court action. Their petition set forth the same reasons for the injunction as were set forth in their motion to dismiss the Federal bill (159a).

On June 17, 1937, your petitioner, Princess Lida of Thurn and Taxis, filed her answer (165a) to this petition.

She averred that the action in the State Court was one *in personam* to compel specific performance of the trust agreement of December 6, 1906; that that action had been finally terminated and the decrees therein satisfied; that no action remained pending in the State Court when the Federal Court action was commenced; that the action in the Federal Court was an action *in personam* and a separate and independent controversy, not growing out of the action in the State Court; and that the State Court did not have the power to deprive her of the right given to her by the Constitution and the laws of the United States to sue in the Federal Court (172a).

On June 29, 1937, a decree was entered in the State Court permanently enjoining your petitioners from further prosecuting the action in the Federal Court (174a).

On July 6, 1937, an appeal from that decree was taken to the Supreme Court of Pennsylvania, which, *on March 21, 1938*, handed down an opinion of affirmance (329 Pa. 497; 198 Atl. 58).

Proceedings in Federal Court to Restrain Respondents from Attempting to Enjoin Prosecution of Federal Court Action

On July 6, 1937, your petitioner, John Purcell Fitzgerald, filed a petition (246a) in the Federal Court praying that the respondents be enjoined from further prosecution of the proceedings in the State Court to enjoin your petitioners from prosecuting the Federal Court action.

On September 18, 1937, *the Federal Court granted such injunction*, and set November 8, 1937, as the date

for the hearing to determine the jurisdictional issue (257a). This issue was thereupon fully argued.

On *March 21, 1938*, the Federal Court rendered its opinion holding that it has jurisdiction over the action instituted by your petitioners therein; that its jurisdiction is not impaired by any proceedings had in the State Court; that the proceedings in the State Court were *in personam* and not *in rem* or *quasi in rem*; that when the decrees of 1911 and 1915 were fully satisfied on May 25, 1925, the jurisdiction of the State Court was at an end; and that the action should, therefore, proceed to trial in the Federal Court. See copy of Opinion, Appendix A hereto.

Other Proceedings in State Court

Since the commencement of the action in the State Court, there have been a number of changes in the personnel of the trustees, each new trustee having been chosen by the remaining trustees and such choice having been confirmed by the State Court (6a-10a).

On October 9, 1925, a First and Partial Account of the then trustees was filed in the State Court. No exceptions were filed thereto and it was confirmed by the State Court (9a).

On July 7, 1930, a Second and Partial Account of the then trustees was filed in the State Court. Exceptions were filed to said account by Gerald Purcell Fitzgerald but said account has not yet been passed upon by the State Court (11a).

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

A writ of certiorari should be granted:

1. To resolve the conflict of jurisdiction between the State Court and the Federal Court which have reached exactly opposite decisions as between the parties, thus creating an impasse. In *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, this Court granted a writ of certiorari to resolve a conflict of jurisdiction between a Court of Common Pleas of Pennsylvania, and a Federal District Court in that State, the Court saying at page 194 that:

> "The federal question, reviewable on appeal, is whether the state court has given proper effect to the proceedings and the order of the federal court. *Buck* v. *Colbath*, 3 Wall. 334, 340; *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 142; *Morgan* v. *Sturges*, 154 U. S. 256, 267; *Central National Bank* v. *Stevens*, 169 U. S. 432, 456; *Farmers Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 44, 54."

2. Because the decision of the State Court denies the right granted to, and asserted by, your petitioners (172a) under Section 24, subdivision 1, of the Judicial Code (28 U. S. C. A. § 41, subd. 1), to prosecute the Federal Court action.

3. Because, whether or not the State Court action was an action *in rem*, *quasi in rem*, or *in personam*, it was terminated prior to the commencement of the Federal Court Action.

4. Because both the State Court action and the Federal Court action are actions *in personam* and not actions *in rem* or *quasi in rem*, and the granting of an injunction against the further prosecution of the Federal Court action was, therefore, erroneous.

5. Because the decision of the Supreme Court of Pennsylvania is in conflict with *U. S.* v. *Klein*, 82 L. Ed. 582; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, and prior decisions of this Court, in that, even if the State Court action be an action *in rem* or *quasi in rem* and still pending, that Court's jurisdiction is exclusive only in so far as necessary for that Court's control and disposition of the property, and the Federal Court action does not interfere with the State Court's control and disposition thereof. The actions were and are for different purposes.

6. Because the State Court had no jurisdiction or power to enjoin, it being solely for the Federal Court to determine whether or not it would defer to the alleged prior jurisdiction of the State Court.

7. Because the State Court has decided a federal question of substance not heretofore determined by this Court or has decided it in a way not in accord with applicable decisions of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket, No. 172 March Term, 1937, Appeal from the Decree of Court of Common Pleas of Fayette County, at No. 618 in Equity, *Josiah V. Thompson, Trustee, et al.* v. *Gerald Purcell Fitzgerald,* individually and as Trustee, *et al.*, Appeal of Lida, Princess of Thurn and Taxis (Hungary), and John Purcell Fitzgerald, and that the said decree of the Supreme Court of Pennsylvania may be reversed by this Honorable Court, and that your petitioners may have such other relief and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioners will ever pray.

Dated June 9, 1938.

Respectfully submitted,

PRINCESS LIDA OF THURN AND TAXIS
and JOHN PURCELL FITZGERALD,
Petitioners.

by CHARLES H. TUTTLE,
of Counsel.

CHARLES H. TUTTLE,
R. MURRAY GIBSON, JR.,
GERALD J. CRAUGH,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Supreme Court of Pennsylvania is in 329 Pa. 497; 198 Atl. 58.

The opinion of the Court of Common Pleas of Fayette County, Pennsylvania, is on pages 179a-187a of the record.

The opinion of the Federal Court has not yet been reported, buf is printed in Appendix A hereto.

Jurisdiction

The decree of the Supreme Court of Pennsylvania was entered on March 21, 1938.

Jurisdiction to issue the writ is found in the provisions of Section 237b of the Judicial Code (28 U. S. C. A. § 344b).

In the State Court petitioners claimed a right and privilege under a statute of the United States (Section 24, subd. 1, of the Judicial Code, 28 U. S. C. A. § 41), when they asserted their right to prosecute the Federal Court action, given to them by the laws and Constitution of the United States (172a).

Petitioners "had the undoubted right under the statute to invoke the jurisdiction of the Federal Court." (*Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234.)

ARGUMENT

A.

The State and Federal actions were for different purposes, presented different causes of action and sought different relief. Hence, the State Court had no power to enjoin the Federal action or to deprive the petitioners of their statutory rights in the Federal Court.

The bill of complaint in the State Court shows that, fundamentally, its purpose was to compel Gerald specifically to perform his side of the agreement of December 6, 1906 (15a-50a). The prayer for relief is, in substance, that he be ordered to deliver to the trustees the moneys which he had agreed to deliver to them, and that he and the defendant Lenhart (being the second of the three trustees) be removed from office (49a). Lenhart was charged with aiding Gerald "to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906" (48a).

This action terminated in the decrees of 1911 and 1915 which, true to the nature of the action, were merely decrees compelling specific performance by Gerald. These decrees granted nothing as against Lenhart; but, on the contrary, required Gerald to account to him (as trustee) and to Thompson (as the third trustee).

These decrees were fully satisfied by full compliance therewith by Gerald on or before May 25, 1925 (181a,

192a, 206a, 215a, 229a, 230a, 237a, and opinion of Judge SCHOONMAKER in Appendix A. See also filed Statement of Satisfaction, Appendix B).

On the other hand, the action in the Federal Court is one to compel the entirely different and subsequently substituted trustees, successors to Gerald, Lenhart and Thompson, to account for *their* actions as trustees and to fulfill *their* obligations as such (188a, 194a). The said trustees were charged with mismanaging the trust estate, unlawfully causing losses therein, and failing to account.

Of this action the Federal Court had full jurisdiction by reason of diversity of citizenship and the presence of the jurisdictional amount.

Hence, the two actions present entirely different parties, controversies and subject-matters; have altogether different purposes; and seek altogether different relief.

The State Court action was *on the written contract* to compel Gerald to perform it *in favor* of the then trustees. The Federal action was *on the fiduciary obligation* of entirely different trustees to hold them accountable for loss through *their* misconduct.

B.

The State Court action, whether *in rem, quasi in rem* or *in personam*, was terminated prior to the commencement of the Federal Court action. The State Court decrees had expressed no retention of jurisdiction.

Although the decree of March 15, 1911 impressed a lien upon the interests of Gerald in the real property to insure the payments, and although the decree of March 5, 1915,

directed that Gerald secure the payments by a mortgage on his interest in the real property, the fact is that the two funds of $330,000 and $400,000 which Gerald was required to create were created and fully accumulated and paid over to the trustees by Gerald prior to the commencement of the Federal Court action (181a, 192a, 206a, 215a, 229a, 230a, 237a).

In their brief in the Supreme Court of Pennsylvania, the trustees admit that Gerald "has made payment in full of all sums required by the original contract by him to be made" (p. 49).

On June 3, 1925, the trustees filed a satisfaction in the State Court dated May 25, 1925, wherein they acknowledged full payment by Gerald to them of all sums which he was required to pay by any decree entered in the State Court action and in consideration thereof satisfying said decrees in full of debt, interest and costs (Opinion of SCHOONMAKER, J., Appendix A, and Statement of Satisfaction, Appendix B).

At the most, jurisdiction of a court continues only "until the judgment shall be satisfied" (*Central National Bank* v. *Stevens*, 169 U. S. 432, 464).

The decrees of March 15, 1911 (140a-143a), *and March 5, 1915* (151a-154a), *did not direct the trustees to perform any act.* Their duties were fixed only by the agreement of December 6, 1906. Those decrees ran against Gerald, not against the other trustees. Neither of said decrees nor said agreement required the trustees to account to the Court; nor did they require any supervision of the trust or the trustees by the Court.

It is true that the decree of March 15, 1911, provided that if the trustees remaining after the removal of Gerald could not agree upon a third trustee, then they should

eport their disagreement to the Court (142a). However, he remaining trustees did agree upon a third trustee n place of Gerald, and it was not necessary for them o make any report to the Court (6a-7a). The trustees id report at that time the appointment of the third trus- ee in place of Gerald and did also report to the Court ubsequent changes in the personnel of the trustees, at hich times the Court entered orders confirming the ap- ointment of substitute trustees (7a-10a). These were ll voluntary, *ex parte* and merely incidental proceedings pon the part of the trustees, not required under either f the decrees or the agreement of December 6, 1906.

Similarly, the filing of the First Partial Account on October 9, 1925 (9a), and the filing of the Second Partial Account on July 7, 1930 (10a), were voluntary *ex parte* proceedings not required by the agreement or either of he said decrees. Under the decree of March 15, 1911, ll that remained to be done after the appointment of the hird trustee in place of Gerald was the making of the equired payments and deliveries by Gerald to the trus- ees,—requirements which were fully met before the Fed- ral action began.

As said by Judge SCHOONMAKER in his opinion in the ederal action (Appendix A hereto): —

> "No court action would be necessary to enable the trustees to carry out fully the terms of the trust, and to dispose of the property when the trust was terminated, for that was all provided for by the trust-agreements. True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust-agreement for filing such accounts in court, nor is there any provision in

> the decrees of the court for such accounts to be filed." • • •
>
> "Any subsequent charges of mismanagement or misconduct on the part of the trustees would be the subject of the court inquiry only when jurisdiction was invoked by some party aggrieved by such mismanagement or misconduct."

Furthermore, the State Court did not provide in the decree of March 15, 1911, or the decree of March 5, 1915, that it retained jurisdiction of the action.

In *Tyronza Special School District* v. *Speer*, 94 F. (2d), 825 (C. C. A. 8), a conflict of jurisdiction arose between a State Court and a Federal Court. The Court held that, since the decree of the State Court had not provided that jurisdiction was retained over any property, the State Court suit had terminated upon the entry of a decree. The Court said (p. 828):

> "We cannot find that the state court was then exercising its jurisdiction over any res. Even if it could be said that the suit commenced by Collins was in rem, the decree entered therein on May 6, 1935, dismissed that proceeding without retaining jurisdiction over any property."

In *State ex rel. McManus* v. *Muench*, 217 Mo. 134, 117 S. W. 25, the Court held that where a decree has been entered in a suit involving a trust and a decree has been entered appointing a new trustee, the power of the Court in the subject matter of that particular suit is exhausted and at an end. The Court said (pp. 139-140 of 217 Mo.)

> "• • • having invested him (the new trustee) with title, the power of the court in the subject-matter

of that particular suit was exhausted and at end. This certainly is so unless we adopt the heresy that a court, *sua sponte*, may hold a trust estate in its grasp for all purposes of administration under some droll notion that, once in chancery for any purpose whatsoever, a trust estate is always in chancery for all purposes whatsoever."

C.

The State Court and the Federal Court actions are both actions *in personam* and not actions *in rem* or *quasi in rem*.

The State Court action was an action to compel specific performance by Gerald of the agreement of December 6, 1906. The State Court never had possession of any *res*. The trustees were not officers of the State Court like receivers. They were provided for in the agreement, and the office which they held was created by the agreement. The property in the trustees' possession was "not in *custodia legis* as in case of receivers" (*Commonwealth Company* v. *Bradford*, 297 U. S. 613, 619).

The trustees were not required by the trust agreement or by any decree of the State Court to file accounts in the State Court. Under the agreement the trustees were empowered to appoint substitute trustees without the necessity of resorting to the State Court (21a).

In other words, the trust was fully capable of performance without any participation by the State Court.

As was said in *Hinkley* v. *Art Students League*, 37 F. (2d) 225, 226 (C. C. A. 4), cert. denied 281 U. S. 733:

> "The trustees were not appointed such by the court, and they did not acquire possession of the property by an order of the court. The possession of a sheriff by virtue of a writ issued by his court, or the possession of receivers, taken by virtue of an order of the court appointing them, is by general consent to be regarded as the possession of the court. But it seems to us an unauthorized and improper extension of the non-interference doctrine to treat the possession of the trustees here as the possession of the circuit court of Baltimore city. On the other hand, the trustees are more reasonably regarded as mere suitors who have possession of the property in dispute; but whose possession could not prevent the trial court from taking jurisdiction to grant the relief asked in the bill."

Clearly, therefore, the State Court did not have possession of any *res* and the action before it was one *in personam*.

Similarly, the Federal Court action is an action *in personam*. In that action plaintiffs merely asked (1) that the trustees be required to account, (2) that the trustees be removed, (3) that the trustees be required to give bond for the faithful performance of their duties, and (4) for such other and further relief as may be just. An action to remove a trustee has been definitely declared to be an action *in personam* and not an action *in rem*. *Parker* v. *Kelley*, 166 Fed. 968, 971 (C. C. W. D. N. Y.); and an action to compel a trustee to account is likewise an action *in personam* and not *in rem*, *Brown* v. *Duffin*, 13 F. (2d) 708, 710 (C. C. A. 6).

D.

Even if the State Court action be an action *in rem* or *quasi in rem* and be not terminated, the Federal Court action does not interfere with the State Court's possession of any *res*.

In *U. S.* v. *Klein*, 82 L. Ed. 582, decided by this Court on February 28, 1938, the rule was reiterated that even if an action *in rem* or *quasi in rem* is pending in one Court, that Court's jurisdiction is exclusive only in so far as necessary for the control and disposition of the *res*.

Even if there had been any *res* in the State Court action, that *res* was only the money which Gerald had agreed to deliver to the trustees; and the sole purpose of that action was to compel him to turn over that money to the trustees. Only to that extent would the State Court have jurisdiction over a *res* (if there were any) and any right to control and dispose of it. On the other hand, since the action in the Federal Court is solely to compel the trustees to account and to remove them for their personal misconduct, that action could not interfere in any way with the (alleged) *res* which the State Court action undertook to get from Gerald and give to the trustees.

Moreover, even if it also be assumed for the sake of argument that there is a *res* in the Federal Court action also, that *res* would be altogether different from the (alleged) *res* which the State Court action sought to get from Gerald and deliver to the trustees. The latter *res* could only be Gerald's money; whereas the former could only be the trust property in the hands of the trustees.

See opinion of Judge SCHOONMAKER, Appendix A hereto.

E.

In any event, the State Court had no right or power to enjoin the action in the Federal Court.

Although cases may be found where a Federal Court has deferred to a previously acquired jurisdiction by a State Court of an action *in rem*, it is for the Federal Court and not for the State Court to decide that question.

We have found no case where either this Court or a lower Federal Court has held that a State Court may enjoin proceedings in a Federal Court.

Many cases state the general or theoretical rule that the court which first acquires jurisdiction of an action *in rem* retains jurisdiction to the exclusion of any other court (*Kline* v. *Burke Constr. Co.*, 260 U. S. 226); but we have found no case where this Court has recognized the right of a State Court to *enjoin* a Federal Court action even though the State Court action be *in rem*. The proper procedure is to apply to the Federal Court for a stay of the Federal Court action pending the final determination of the State Court action.

It was so held in the leading case of *Freeman* v. *Howe*, 24 How. 450. There this Court said (p. 459):

> "But the question is, which tribunal, the Federal or State, possesses the power to determine the question of jurisdiction or validity of the process? * * * We regard the question as settled * * * that it belongs to the Federal Courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most careful and deliberate consideration, in the opinion of the present Chief Justice, in the case of the *United States* v. *Booth* (21 How. 506)."

A similar expression is found in *Moran* v. *Sturges*, 154 U. S. 256, where this Court said (p. 286):

> "That the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance; that the District Court had jurisdiction and that the judgment under review was in effect an unlawful interference with proceedings in that Court."

Rose's Notes (Revised Edition), Vol. 5, contains the following footnote to *Freeman* v. *Howe*, *supra* (p. 474):

> "*It belongs to Federal courts to determine question of their own jurisdiction, the Supreme Court being the ultimate arbiter.*
>
> "Approved in Nashville *v.* Cooper, 6 Wall. 253, 18 L. Ed. 853, holding Federal court had jurisdiction where acts complained of were done under military authority of United States; Fitzgerald *v.* Fitzgerald & Mallory Constr. Co., 44 Neb. 495, 62 N. W. 910, declining to review finding of Federal court that latter had no jurisdiction of case."

In the *Fitzgerald* case just referred to, the Supreme Court of Nebraska declined to examine the grounds for a conflict of jurisdiction and said (44 Neb. 495):

> "It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action (*Freeman* v. *Howe*, 24 How. (U. S.), 459)."

See also *Hines & Hobbs* v. *Rawson*, 40 Ga. 356; and *Shelby* v. *Bacon*, 10 How. 56, 70-71.

In *Central National Bank* v. *Stevens*, 169 U. S. 432, this Court, in reversing a determination of the Court of

Appeals of New York affirming an injunction granted by the Supreme Court of that State against certain proceedings in the Federal Court, acknowledged the general rule that "the courts of one country", having the necessary parties before them, may in equity enjoin such parties from proceeding with a suit in the courts "of another country"; but this Court, quoting from Story's Eq. Jur. § 899, said (p. 463):

> "The learned judge overlooked the passage immediately following, and hereinbefore quoted: 'There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.' Nor did the decision of this court in *Peck* v. *Jenness*, already cited, receive attention, wherein it was said, after adverting to the proposed distinction between enjoining a court and enjoining suitors therein, 'The fact that an injunction issues only to the parties before the court and not to the court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'"

In *American and English Annotated Cases*, Vol. 11, there is the following statement (p. 744):

> "The general rule that there is no authority in the state courts to enjoin proceedings in the courts of the United States has been laid down definitely and distinctly in numerous decisions."

In the case at bar the Federal Court has not only held that the action in the State Court is not an action *in rem* but that such action has been terminated, and that the Federal Court has jurisdiction of the action before it. Jurisdiction having been properly invoked in the Federal Court, the Federal Court is bound to determine the issues raised in that action. In *Commonwealth Company* v. *Bradford*, 297 U. S. 613, 618, this Court said:

> "Jurisdiction having been properly invoked (in the Federal Court) it became the duty of the trial court to determine the issues, unless required by rules based on comity to relegate the complainant to the state court." (Matter in parentheses inserted.)

Here again is a recognition that the matter of jurisdiction is one for the Federal Court alone to determine. That Court, as a matter of comity, may surrender jurisdiction where a prior action *in rem* has been commenced in the State Court, but that is altogether different from saying that the State Court may *force* comity upon the Federal Court by injunction. Any such holding would, in effect, give to the State Court *appellate* power over the Federal Court on every question of comity arising in the Federal Court for *its* decision.

F.

For the foregoing reasons a writ of certiorari should be granted.

Dated June 9, 1938.

Respectfully submitted,

CHARLES H. TUTTLE,
R. MURRAY GIBSON, JR.,
GERALD J. CRAUGH,
Of Counsel.

APPENDIX A

(Opinion of Federal Court)

UNITED STATES DISTRICT COURT

Western District of Pennsylvania

Princess Lida of Thurn and Taxis, a Citizen of the Kingdom of Hungary; and John Purcell Fitzgerald, a Citizen of the State of New York, v. Andrew A. Thompson, William W. Parshall and Robert H. Arnett, Trustees for the Plaintiffs and others, and John S. Harah and Second National Bank of Uniontown, Pennsylvania, A Corporation Created and Existing under the laws of the United States, Administrators of the Estate of G. S. Harah, deceased, former Trustees for the Plaintiffs and others, all of whom are citizens of the Commonwealth of Pennsylvania.	No. 2451 Equity

OPINION

(Filed Mar. 21, 1938)

Schoonmaker, *Judge*:

This is an action in equity wherein plaintiffs, as beneficiaries under a trust created by agreement dated December 6, 1906, between Gerald Purcell Fitzgerald of the first

part; Lida Eleanor Purcell Fitzgerald of the second part; and Josiah V. Thompson, Gerald Purcell Fitzgerald, and Charles E. Lenhart, Trustees, of the third part, charge the defendants Andrew A. Thompson, William W. Parshall, and Robert H. Arnett, the present trustees under said agreement, and John S. Harah and the Second National Bank of Uniontown, Pennsylvania, Administrators of G. S. Harah, deceased, who was a former trustee under said agreement, with mismanagement of the trust-estate created pursuant to said agreement, the loss of money through illegal and negligent conduct in the making of loans and investments from said funds, and ask that they be required to restore all moneys lost through negligence to the trust fund, that they be removed as trustees, and that all trustees appointed be required to give bond for the faithful discharge of their duties.

The defendants answer, denying all misconduct and negligence, averring that the Court of Common Pleas of Fayette County, Pennsylvania, first acquired and still retains sole and exclusive jurisdiction to hear and determine all matters of which the plaintiffs complain by reason of the pendency in that court of a suit in equity at No. 618, filed on October 27, 1910, between Josiah V. Thompson, *et al.*, as plaintiffs; and Gerald Purcell Fitzgerald, *et al.*, as defendants.

We set the case down for trial solely on the jurisdictional question. On this trial, an exemplified copy of the record in the Fayette County Court of Common Pleas case was introduced in evidence. By the record, it appears that Josiah V. Thompson, as trustee for Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitz-

gerald, and Gerald Purcell Fitzgerald; and Lida Eleanor Purcell Fitzgerald in her own right; John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*, brought suit against Gerald Purcell Fitzgerald, individually and as trustee of the trusts described in the bill of complaint; Charles E. Lenhart, as trustee of the trusts described in the bill of complaint; Gerald Purcell Fitzgerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; and Charles E. Lenhart, manager of Fayette Coke Company and Shamrock Supply Company.

This suit is based on the agreement made on the 6th day of December, 1906, between Gerald Purcell Fitzgerald of the Island of Waterford in Ireland, of the first part; Lida Eleanor Purcell Fitzgerald, of the second part; and Josiah V. Thompson, Charles E. Lenhart, and said Gerald Purcell Fitzgerald, as trustees, of the third part. This agreement recites that Lida and Gerald were married in the year 1899, and that the following children were born as the issue of said marriage, to-wit: John Purcell Fitzgerald; Edward Maurice Fitzgerald; and Gerald Purcell Fitzgerald; that Lida was divorced from Gerald by decree of divorce, *a mensa et thoro*, on December 5, 1906, by the High Court of Justice in Ireland. The agreement then provides for alimony payments by Gerald to Lida pending an absolute divorce by Act of Parliament, and provides thereafter for certain payments to the trustees named in the agreement for the benefit of Lida and the children from profits accruing from operation of Fayette Coke Company and the Shamrock Supply Company.

Appendix A

In that suit at No. 618 in Equity in the Fayette County Court of Common Pleas, the bill of complaint set out this trust agreement of December 6, 1906, and charged that the defendant, Gerald Purcell Fitzgerald, had violated the trust agreement in that he had forbidden Lenhart, manager of the properties of the Fayette Coke Company and the Shamrock Supply Company, to pay over to the trustees provided in said agreement, the sums contemplated and set apart by the terms of said agreement, and that he had wholly repudiated said agreement. The bill further charged that the defendant Lenhart had carried out said instructions from defendant Fitzgerald and had failed to discharge his duties as a trustee under said agreement.

The bill of complaint in that case contained the following prayers for relief:

(The Court then sets forth in full the prayer for relief which, for the sake of brevity, is omitted, as it is printed at pages 48a-50a of the record.)

Issue having been joined by answers filed by the defendant, the Court of Common Pleas of Fayette County proceeded to a trial of the issues joined, and thereafter entered the following decree:

(The Court then sets forth in full the decree of March 15, 1911, which is printed at pages 140a-143a of the record.)

Thereafter, and on March 5, 1915, the Trustees and defendant Fitzgerald presented their petition to the Court of Common Pleas of Fayette County, setting up an alteration

in the original agreement of December 6, 1906, and praying for a modification of the decree of March 15, 1911, to correspond therewith. Whereupon, the following consent-decree was entered:

(The Court then sets forth in full the decree of March 5, 1915, which is printed at pages 151a-154a of the record.)

On May 25, 1925, the Trustees acknowledged receipt by them from defendant Fitzgerald of all moneys which he was required to pay by any decree entered in the Fayette County Court of Common Pleas and satisfied said decrees in full of debt, interest and costs. This satisfaction was filed in that court on June 3, 1925.

The Trustees have filed in the Court of Common Pleas of Fayette County two financial reports of the operation of their trust, one December 7, 1925, which was confirmed by the court, no exceptions being filed thereto; and one on July 7, 1930, to which exceptions were filed by Gerald Purcell Fitzgerald. The court has taken no action with reference to these exceptions.

On May 1, 1937, the present trustees filed a petition in the Fayette County Court of Common Pleas, asking that court to enjoin the plaintiffs in the instant suit from prosecuting this action in this court.

A rule to show cause was granted by that court why this injunction should not issue, and after hearing, the court, on June 29, 1937, made the rule absolute, stating in an opinion filed by Hudson, *P. J.*, in part as follows:

"The position of the trustees is that the institution of the original action, the various proceedings had therein, and the several decrees entered, conferred upon this court complete and exclusive jurisdiction, and that as a result no court of co-ordinate jurisdiction may interfere with the subject matter of the litigation. In other words, they claim that the funds involved are trust funds; that they were in effect created by the decrees of this court; that this court has the constructive possession and potential control thereof, and that the administration of the funds is exclusively within the control of this court.

"The three judges who heard the argument are in accord with that view and accordingly the rule was made absolute.

"These funds are an entity, a thing, or res; they are a trust fund held by the trustees for the use of beneficiaries, and are to be administered and distributed only by the trustees. Obviously, an action having these funds as the subject matter and dealing with their administration is in rem."

The plaintiffs in the instant suit thereupon, on July 6, 1937, entered an appeal from the order of the Fayette County Court to the Supreme Court of Pennsylvania, where the case is now pending and undecided.

In our view, the proceedings in the Court of Common Pleas of Fayette County were not in *rem* or *quasi in rem*, but were rather *in personam* for the specific performance of the agreement of December 6, 1906, by defendant Fitzgerald and his co-defendant Lenhart, who, acting with him as one of the trustees under the agreement, were trying to repudiate that agreement, and not to comply with its terms.

When the decrees of that court were completely satisfied by the trustees on May 25, 1925, then the jurisdiction of the Court of Common Pleas of Fayette County was at an end. From then on, the trustees would function, not under the guidance of the court as in a receivership case, but under terms of agreement of trust of December 6, 1906, as modified by the subsequent agreement of March 5, 1915. No court action would be necessary to enable the trustees to carry out fully the terms of the trust, and to dispose of the property when the trust was terminated, for that was all provided for by the trust-agreements. True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust-agreement for filing such accounts in court, nor is there any provision in the decrees of the court for such accounts to be filed.

We, therefore, cannot see that the court acquired any jurisdiction over the *res* of the estate merely by the fact that the trustees filed such accounts in the Court of Common Pleas.

Any subsequent charges of mismanagement or misconduct on the part of the trustees would be the subject of the court inquiry only when jurisdiction was invoked by some party aggrieved by such mismanagement or misconduct.

Even had the Court of Common Pleas of Fayette County taken possession of the property involved in the trust agreements, its jurisdiction would be exclusive only so far as necessary for that court's control and disposition of the property. The latest word on this subject comes from the Supreme Court of the United States in the case

of U. S. *v.* Philip Klein, Escheator, No. 439, decided February 28, 1938, involving the escheat of money deposited in the registry of a Federal court. There, Mr. Justice Stone, delivering the opinion of the court, says:

> "While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. Penn General Casualty Co. *v.* Pennsylvania, 294 U. S. 189; see Leadville Coal Co. v. McCreery, 141 U. S. 475, 477. Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. Penn General Casualty Co. *v.* Pennsylvania, supra; see Heidritter *v.* Elizabeth Oilcloth Co., 112 U. S. 294, 304; cf. Buck *v.* Colbath, 3 Wall. 334, 342; Riehle *v.* Margolies, 279 U. S. 218. Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. Yonley *v.* Lavendar, 21 Wall. 276; Byars *v.* McAuley, 149 U. S. 608, 620; Security Trust Co. *v.* Black River National Bank, 187 U. S. 211, 227; Waterman *v.* Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 43, 46; Commonwealth Trust Co. *v.* Bradford, 297 U. S. 613, 619; General Baking Co. *v.* Harr, 300 U. S. 433."

Therefore, there being diversity of citizenship and the requisite amount being involved, we hold that this court has jurisdiction to hear and determine the issues raised by the pleadings in this case. The case may be set down for trial on the equity-calendar.

Appropriate findings and an order may be submitted accordingly.

APPENDIX B

(Satisfaction Filed in State Court on June 3, 1925 of all Decrees of That Court)

IN THE

COURT OF COMMON PLEAS OF FAYETTE COUNTY

Between J. V. THOMPSON, *et al.*, *Plaintiffs,* and GERALD PURCELL FITZGERALD, *et al.*, *Defendants.*	No. 618 In Equity

We, WILLIAM W. PARSHALL, G. S. HARAH and A. A. THOMPSON, trustees, duly appointed by sundry decrees entered by the said court in the said cause, duly qualified and acting, hereby acknowledge payment by Gerald Purcell

Fitzgerald, one of the defendants, of all sums of money which he by any decree entered in the said cause was required and commanded to pay, and in consideration thereof we hereby satisfy the said decrees in full of debt, interest and costs.

Witness our hands and seals, this 25th day of May, 1925.

William W. Parshall	Seal
G. S. Habah	Seal
A. A. Thompson	Seal

Signed, Sealed and Delivered in the presence of

Charles L. Lewellyn
E. C. Higbee

Before me, a notary public in and for said county and state personally came the above named William W. Parshall and A. A. Thompson and in due form of law acknowledged the foregoing satisfaction of decree to be their act and each of their act and deed as trustees, and desired that it be recorded as such.

In Witness Whereof, I have hereunto set my hand and notarial seal this 25th day of May, 1925.

Charles L. Lewellyn
Notary Public
My Commission expires February 8, 1927.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1938

No. 118

PRINCESS LIDA OF THURN AND TAXIS, formerly Lida Eleanor Purcell Fitzgerald, and JOHN PURCELL FIZGERALD

Petitioners

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the Trusts hereinafter described, *et al.*, etc.

PETITIONERS' BRIEF ON WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF PENNSYLVANIA

CHARLES H. TUTTLE
and
GERALD J. CRAUGH
15 Broad Street
New York, N. Y.

and

R. MURRAY GIBSON, JR.
1108 Plaza Building
Pittsburgh, Pa.

Counsel for Petitioners

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Supreme Court of the United States

October Term, 1938

No. 118

PRINCESS LIDA OF THURN AND TAXIS, formerly Lida Eleanor Purcell Fitzgerald, and JOHN PURCELL FITZGERALD,

Petitioners,

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the Trusts hereinafter described, *et al.*, etc.

PETITIONERS' BRIEF ON WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF PENNSYLVANIA

Petitioners are before this Court on a writ of certiorari granted on October 10, 1938 to review the final decree of the Supreme Court of Pennsylvania entered March 21, 1938, in an action, the title of which appears at page 1 of the record (168).*

Such decree affirmed a decree (113) of the Court of Common Pleas, Fayette County, Pennsylvania (hereinafter called "the State Court") enjoining petitioners from prosecuting an action in the United States District Court

* Figures in parentheses refer to pages of the record.

for the Western District of Pennsylvania (hereinafter called "the Federal Court"). The title of such action appears at page 122 of the record.

The Federal Court held that the action in the State Court was an action *in personam*, that it had been terminated, and that the jurisdiction of the State Court had ended on May 25, 1925, when the decrees of that Court previously entered were completely satisfied. Such satisfaction is evidenced by a satisfaction piece, dated May 25, 1925, and filed in the State Court on June 3, 1925. (Appendix B.)

Opinions Below

The opinion of the Supreme Court of Pennsylvania is reported at pages 170-183 of the record and in 329 Pa. 497; 198 Atl. 58.

The opinion of the Court of Common Pleas, Fayette County, Pennsylvania, is printed at pages 116-122 of the record.

The opinion of the United States District Court for the Western District of Pennsylvania has not been reported, but is printed in Appendix A hereto.

STATEMENT OF THE CASE

The Trust Agreement

On December 6, 1906, an agreement (11-17) was made between Gerald Purcell Fitzgerald of Ireland, of the first part; his wife, Lida Eleanor Purcell Fitzgerald (now Princess Lida of Thurn and Taxis), of the second part; and Josiah V. Thompson, Charles E. Lenhart, and said Gerald Purcell Fitzgerald, as trustees, of the third part.

The agreement recites that Lida and Gerald were married in the year 1899; that they had the following children, John Purcell Fitzgerald, Edward Maurice Fitzgerald, and Gerald Purcell Fitzgerald; and that on December 5, 1906, Lida obtained a decree of divorce from Gerald by decree of the High Court of Justice in Ireland.

The agreement provides:

1. For payments of alimony by Gerald to Lida, pending the absolute divorce which was eventually granted (28); and for payments thereafter by Gerald to the trustees, for the benefit of Lida and the children, out of his profits from his nine-tenths interest in two partnerships, Fayette Coke Company and Shamrock Supply Company (10-11).

2. Out of these profits Gerald is to pay to the trustees (a) for the benefit of Lida, an annuity of $15,000 for the first three years and $20,000 per year thereafter (12), and (b) the difference between such annuity and one-third of his share of such profits until a fund of $300,000 shall be created (13).

3. Beginning February 1, 1908, and annually thereafter one-half of the income from such fund of $300,000 or from so much thereof as shall have been received and invested by the trustees, is to be paid to Lida, and one-half is either to accumulate or to be expended for the benefit of the children, or in the discretion of the trustees is to be paid to the wife until the eldest child becomes 21 years of age. As each child becomes 21 years of age he is to receive his share of the income. On the death of Lida after the youngest child shall attain 21 years of age, the trustees are to distribute the remainder of the fund and all accumulations among the surviving children (13).

4. Upon the death of Lida and the children, the principal of such fund shall be paid by the trustees to Gerald or his estate (14).

5. Where a vacancy in the office of trustee occurs, such vacancy is to be filled by the surviving trustees (14).

Lida and all three children are still alive and the youngest child has attained 21 years of age.

This agreement was performed until June, 1910, when Gerald repudiated it (29, 59).

The State Court Action to Compel Performance

On October 27, 1910, a bill in equity was filed in the State Court by the other parties to the agreement to compel Gerald to perform, and to remove him and Lenhart as trustees (10).

State Court Decree of March 15, 1911

On March 15, 1911, the State Court entered its decree (92), (1) directing that Gerald pay to the trustees the arrears under the agreement, (2) directing that the agreed payments be a lien on Gerald's interest in the real property of Fayette Coke Company and Shamrock Supply Company, (3) removing Gerald as a trustee, (4) appointing a referee to take his account and granting judgment for the amount found due, (5) directing the two remaining trustees to appoint a third, (6) enjoining Gerald from disposing of his interest until the aforesaid fund of $300,000 had been accumulated, and (7) directing that Gerald pay the costs (92-94).

Lenhart was not removed.

State Court's Modifying Decree of March 5, 1915

On March 5, 1915 (99), the State Court entered a modifying decree.

This provided that Gerald shall assign to the trustees his nine-tenths interest in the sinking fund of Fayette Coke Company, amounting to $88,733.20, which sum is to be used in payment of the arrears up to January 1, 1915 of $10,242.12 on the annuity to Lida and in payment of $78,491.08 toward the accumulation of a fund of $400,000, to be created for the purpose of insuring payment of said annuity of $20,000 to Lida. The modifying decree further provides that Gerald pay the sum of $321,508.92 (the balance of such fund of $400,000) to the trustees within seven years from January 1, 1915, such payment of $321,508.92 to be made out of a sinking fund to be provided by Gerald, and to be secured by a mortgage on Gerald's interest in the property of Fayette Coke Company (99-101).

This modifying decree further provided (100-101) that, upon the death of Lida, such part of said sum of $400,000 as shall have been paid to the trustees plus accumulations thereon shall be paid to Gerald, his heirs, executors, administrators or assigns and any unpaid balance of the mortgage shall be satisfied and discharged provided the fund of $300,000 for the benefit of the children shall be fully accumulated. If such fund of $300,000 is not then fully accumulated, the trustees shall retain so much of the securities in their hands including any unpaid balance of the mortgage as may be necessary to fully accumulate said fund of $300,000.

Both State Court Decrees Fully Satisfied

The separate funds of $300,000 and $400,000 required to be created under the decrees of March 15, 1911 and March 5, 1915 were fully created and accumulated on or before May 25, 1925, and all that Gerald was required to do under them was done by him.

Both decrees were satisfied before the commencement of the Federal Court action (117, 118, 124, 134, 140, 150, 151, 155, 229a). At page 49 of their brief in the Supreme Court of Pennsylvania, and at page 17 of their brief in opposition to the petition for writ of certiorari herein the trustees asserted that Gerald has *"made payment in full of all sums required by the original contract by him to be made."*

On June 3, 1925, prior to the commencement of the Federal Court action, the trustees filed in the State Court a satisfaction dated May 25, 1925, acknowledging the payment by Gerald of all sums of money which he was required to pay by any decree entered in the State Court action, and in consideration thereof satisfying said decrees in full of debt, interest and costs. (Opinion of SCHOONMAKER, *J.*, Appendix A, and copy of satisfaction, Appendix B hereto.)

The Federal Court Action

On July 8, 1930, your petitioners, as beneficiaries under the agreement of December 6, 1906, filed their bill of complaint in the Federal Court against the present trustees, Andrew A. Thompson, William W. Parshall and Robert H. Arnett, and the administrators of the Estate of G. S. Harah, deceased, a former trustee, alleging mis-

management of the trust funds, and praying that the trustees be removed and that the defendants be made to account and to repay the losses (122).

On July 29, 1930, the trustees filed a motion in the Federal Court to dismiss this bill of complaint for absence of indispensable parties, and because the State Court, by virtue of the aforesaid proceedings in the State Court, had exclusive jurisdiction of the controversy sought to be litigated in the Federal Court (127).

On May 12, 1931, the Federal Court rendered its opinion denying this motion to dismiss and refusing to decide whether or not the State Court had exclusive jurisdiction until after answer had been filed and proof ordered (135).

On May 18, 1931, the defendants filed their answer averring, *inter alia*, that the controversy was within the exclusive jurisdiction of the State Court (139).

On April 17, 1937, your petitioners filed an amendment to the bill of complaint in the Federal Court action (151), and on May 5, 1937, the trustees filed their answer thereto (155).

Proceedings in State Court to Restrain Prosecution of Federal Court Action

On May 1, 1937, the trustees filed a petition in the State Court (104) wherein they prayed that your petitioners be temporarily enjoined, and show cause why they should not be permanently enjoined from further prosecuting the Federal Court action. Their petition set forth the same reasons for the injunction as were set forth in their motion to dismiss the Federal bill (104).

On June 17, 1937, your petitioner, Princess Lida of Thurn and Taxis, filed her answer (108) to this petition. She averred that the action in the State Court was one

in personam to compel specific performance of the trust agreement of December 6, 1906; that that action had been finally terminated and the decrees therein satisfied; that no action remained pending in the State Court when the Federal Court action was commenced; that the action in the Federal Court was an action *in personam* and a separate and independent controversy, not growing out of the action in the State Court; and that the State Court did not have the power to deprive her of the right given to her by the Constitution and the laws of the United States to sue in the Federal Court (112).

On June 29, 1937, a decree was entered in the State Court permanently enjoining your petitioners from further prosecuting the action in the Federal Court (113).

On July 6, 1937, an appeal from that decree was taken to the Supreme Court of Pennsylvania, which, *on March 21, 1938*, handed down an opinion of affirmance (329 Pa. 497; 198 Atl. 58).

Proceedings in Federal Court to Restrain Respondents from Attempting to Enjoin Prosecution of Federal Court Action

On July 6, 1937, your petitioner, John Purcell Fitzgerald, filed a petition (160) in the Federal Court praying that the respondents be enjoined from further prosecution of the proceedings in the State Court to enjoin your petitioners from prosecuting the Federal Court action.

On September 18, 1937, *the Federal Court granted such injunction*, and set November 8, 1937, as the date for the hearing to determine the jurisdictional issue (166). This issue was thereupon fully argued.

On *March 21, 1938*, the Federal Court rendered its opinion holding that it has jurisdiction over the action

instituted by your petitioners therein; that its jurisdiction is not impaired by any proceedings had in the State Court; that the proceedings in the State Court were *in personam* and not *in rem* or *quasi in rem;* that when the decrees of 1911 and 1915 were fully satisfied on May 25, 1925, the jurisdiction of the State Court was at an end; and that the action should, therefore, proceed to trial in the Federal Court. See copy of Opinion, Appendix A hereto.

Other Proceedings in State Court

Since the commencement of the action in the State Court, there have been a number of changes in the personnel of the trustees, each new trustee having been chosen by the remaining trustees and such choice having been confirmed by the State Court (4-7).

On October 9, 1925, a First and Partial Account of the then trustees was filed in the State Court. No exceptions were filed thereto and it was confirmed by the State Court (6).

On July 7, 1930, a Second and Partial Account of the then trustees was filed in the State Court. Exceptions were filed to said account by Gerald Purcell Fitzgerald but said account has not yet been passed upon by the State Court (7).

Assignment of Errors

Petitioners assert that the decision of the Court below is erroneous because:

1. The State Court action and the Federal Court action were for different purposes, presented different causes

of action, different parties, and sought different relief. Hence, the State Court had no power to enjoin the prosecution of the Federal Court action or to deprive petitioners of their statutory right to sue in the Federal Court, under Section 24, subd. 1, of the Judicial Code (Title 28, U. S. C. A., § 41, subd. 1).

2. The State Court action, whether *in rem*, *quasi in rem* or *in personam*, was terminated prior to the commencement of the Federal Court action. The State Court decrees had expressed no retention of jurisdiction.

3. The State Court and the Federal Court actions are both actions *in personam* and not actions *in rem* or *quasi in rem*.

4. Even if the State Court action be an action *in rem* or *quasi in rem* and be not terminated, the Federal Court action does not interfere with the State Court's possession of any *res*.

5. In any event, the State Court had no right or power to enjoin the prosecution of the Federal Court action, it being solely for the Federal Court to determine whether or not it would defer to the alleged prior jurisdiction of the State Court.

ARGUMENT

A.

The State and Federal actions were for different purposes, presented different causes of action, different parties, and sought different relief. Hence, the State Court had no power to enjoin the Federal action or to deprive the petitioners of their statutory rights in the Federal Court.

The bill of complaint in the State Court shows that, fundamentally, its purpose was to compel Gerald specifically to perform his side of the agreement of December 6, 1906 (10-32). The prayer for relief is, in substance, that he be ordered to deliver to the trustees the moneys which he had agreed to deliver to them, and that he and the defendant Lenhart (being the second of the three trustees) be removed from office (31). Lenhart was charged with aiding Gerald "to withhold from the aforesaid trustees all sums due and payable to them by virtue of the aforesaid agreement of December 6, 1906" (30).

This action terminated in the decrees of 1911 and 1915 (92, 99) which, true to the nature of the action, were merely decrees compelling specific performance by Gerald. These decrees granted nothing as against Lenhart; but, on the contrary, required Gerald to account to him (as trustee) and to Thompson (as the third trustee).

These decrees were fully satisfied by full compliance therewith by Gerald on or before May 25, 1925 (117, 118, 124, 134, 140, 150, 151, 155, and opinion of Judge SCHOONMAKER in Appendix A. See also filed Statement of Satisfaction, Appendix B).

On the other hand, the action in the Federal Court is one to compel the entirely different and subsequently substituted trustees, successors to Gerald, Lenhart and Thompson, to account for *their* actions as trustees and to fulfill *their* obligations as such (122, 126). The said trustees were charged with mismanaging the trust estate, unlawfully causing losses therein, and failing to account.

Of this action the Federal Court had full jurisdiction by reason of diversity of citizenship and the presence of the jurisdictional amount. In the State Court petitioners asserted their statutory right to prosecute their action in the Federal Court (112-113). This right is given to them by Section 24, subd. 1, of the Judicial Code (28 U. S. C. A., Sec. 41, subd. 1). Petitioners "had the undoubted right under the statute to invoke the jurisdiction of the Federal Court" (*Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234).

Hence, the two actions present entirely different parties, controversies and subject-matters; have altogether different purposes; and seek altogether different relief.

The State Court action was *on the written contract* to compel Gerald to perform it *in favor* of the then trustees. The Federal action was *on the fiduciary obligation* of entirely different trustees to hold them accountable for loss through *their* misconduct.

B.

The State Court action, whether *in rem, quasi in rem* or *in personam*, was terminated prior to the commencement of the Federal Court action. The State Court decrees had expressed no retention of jurisdiction.

Although the decree of March 15, 1911 impressed a lien upon the interests of Gerald in the real property to insure the payments, and although the decree of March 5, 1915, directed that Gerald secure the payments by a mortgage on his interest in the real property, the fact is that the two funds of $300,000 and $400,000 which Gerald was required to create were created and fully accumulated and paid over to the trustees by Gerald prior to the commencement of the Federal Court action (117, 118, 124, 134, 140, 150, 151, 155).

At page 49 of their brief in the Supreme Court of Pennsylvania and at page 17 of their brief in opposition to the granting of the writ of certiorari herein, the trustees admit that Gerald has "made payment in full of all sums required by the original contract by him to be made."

On June 3, 1925, the trustees filed a satisfaction in the State Court dated May 25, 1925, wherein they acknowledged full payment by Gerald to them of all sums which he was required to pay by any decree entered in the State Court action and in consideration thereof satisfying said decrees in full of debt, interest and costs (Opinion of SCHOONMAKER, *J.*, Appendix A, and Statement of Satisfaction, Appendix B).

At the most, jurisdiction of a court continues only "until the judgment shall be satisfied" (*Central National Bank* v. *Stevens*, 169 U. S. 432, 464).

The decrees of March 15, 1911 (92-94), *and March 5, 1915* (99-101), *did not direct the trustees to perform any act.* Their duties were fixed only by the agreement of December 6, 1906. Those decrees ran against Gerald, not against the other trustees. Neither of said decrees nor said agreement required the trustees to account to the Court; nor did they require any supervision of the trust or the trustees by the Court.

It is true that the decree of March 15, 1911, provided that if the trustees remaining after the removal of Gerald could not agree upon a third trustee, then they should report their disagreement to the Court (94). However, the remaining trustees did agree upon a third trustee in place of Gerald, and it was not necessary for them to make any report to the Court (4-5). The trustees did report at that time the appointment of the third trustee in place of Gerald and did also report to the Court subsequent changes in the personnel of the trustees, at which times the Court entered orders confirming the appointment of substitute trustees (5-7). These were all voluntary, *ex parte* and merely incidental proceedings upon the part of the trustees, not required under either of the decrees or the agreement of December 6, 1906.

Similarly, the filing of the First Partial Account on October 9, 1925 (6), and the filing of the Second Partial Account on July 7, 1930 (7), were voluntary *ex parte* proceedings not required by the agreement or either of the said decrees. Under the decree of March 15, 1911, all that remained to be done after the appointment of the third trustee in place of Gerald was the making of the required payments and deliveries by Gerald to the trustees,—requirements which were fully met before the Federal action began.

As said by Judge SCHOONMAKER in his opinion in the Federal action (Appendix A hereto):

> "No court action would be necessary to enable the trustees to carry out fully the terms of the trust, and to dispose of the property when the trust was terminated, for that was all provided for by the trust-agreements. True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust-agreement for filing such accounts in court, nor is there any provision in the decrees of the court for such accounts to be filed." • • •
>
> "Any subsequent charges of mismanagement or misconduct on the part of the trustees would be the subject of the court inquiry only when jurisdiction was invoked by some party aggrieved by such mismanagement or misconduct."

Furthermore, the State Court did not provide in the decree of March 15, 1911, or the decree of March 5, 1915, that it retained jurisdiction of the action.

In *Tyronza Special School District* v. *Speer*, 94 F. (2d) 825 (C. C. A. 8), a conflict of jurisdiction arose between a State Court and a Federal Court. The Court held that, since the decree of the State Court had not provided that jurisdiction was retained over any property, the State Court suit had terminated upon the entry of a decree. The Court said (p. 828):

> "We cannot find that the state court was then exercising its jurisdiction over any res. Even if it could be said that the suit commenced by Collins was in rem, the decree entered therein on May 6, 1935, dismissed that proceeding without retaining jurisdiction over any property."

In *State ex rel. McManus* v. *Muench*, 217 Mo. 124, 117 S. W. 25, the Court held that where a decree has been entered in a suit involving a trust and a decree has been entered appointing a new trustee, the power of the Court in the subject matter of that particular suit is exhausted and at an end. The Court said (pp. 139-140 of 217 Mo.)

> "* * * having invested him (the new trustee) with title, the power of the court in the subject-matter of that particular suit was exhausted and at end. This certainly is so unless we adopt the heresy that a court, *sua sponte*, may hold a trust estate in its grasp for all purposes of administration under some droll notion that, once in chancery for any purpose whatsoever, a trust estate is always in chancery for all purposes whatsoever."

C.

The State Court and the Federal Court actions are both actions *in personam* and not actions *in rem* or *quasi in rem*.

The State Court action was an action to compel specific performance by Gerald of the agreement of December 6, 1906. The State Court never had possession of any *res*. The trustees were not officers of the State Court like receivers. They were provided for in the agreement, and the office which they held was created by the agreement. The property in the trustees' possession was "not in *custodia legis* as in case of receivers" (*Commonwealth Company* v. *Bradford*, 297 U. S. 613, 619).

The trustees were not required by the trust agreement or by any decree of the State Court to file accounts in the State Court. Under the agreement the trustees

were empowered to appoint substitute trustees without the necessity of resorting to the State Court (14).

In other words, the trust was fully capable of performance without any participation by the State Court.

As was said in *Hinkley* v. *Art Students League*, 37 F. (2d) 225, 226 (C. C. A. 4), cert. denied 281 U. S. 733:

> "The trustees were not appointed such by the court, and they did not acquire possession of the property by an order of the court. The possession of a sheriff by virtue of a writ issued by his court, or the possession of receivers, taken by virtue of an order of the court appointing them, is by general consent to be regarded as the possession of the court. But it seems to us an unauthorized and improper extension of the non-interference doctrine to treat the possession of the trustees here as the possession of the circuit court of Baltimore city. On the other hand, the trustees are more reasonably regarded as mere suitors who have possession of the property in dispute; but whose possession could not prevent the trial court from taking jurisdiction to grant the relief asked in the bill."

Clearly, therefore, the State Court did not have possession of any *res* and the action before it was one *in personam*.

Similarly, the Federal Court action is an action *in personam*. In that action plaintiffs merely asked (1) that the trustees be required to account, (2) that the trustees be removed, (3) that the trustees be required to give bond for the faithful performance of their duties, and (4) for such other and further relief as may be just. An action to remove a trustee has been definitely declared to be an action *in personam* and not an action *in rem*. *Parker* v. *Kelly*, 166 Fed. 968, 971 (C. C. W. D. N. Y.); and an

action to compel a trustee to account is likewise an action *in personam* and not *in rem*. *Brown* v. *Duffin*, 13 F. (2d) 708, 710 (C. C. A. 6).

D.

Even if the State Court action be an action *in rem* or *quasi in rem* and be not terminated, the Federal Court action does not interfere with the State Court's possession of any *res*.

In *U. S.* v. *Klein*, 303 U. S. 276, the rule was reiterated that even if an action *in rem* or *quasi in rem* is pending in one Court, that Court's jurisdiction is exclusive only in so far as necessary for the control and disposition of the *res*.

Even if there had been any *res* in the State Court action, that *res* was only the money which Gerald had agreed to deliver to the trustees; and the sole purpose of that action was to compel him to turn over that money to the trustees. Only to that extent would the State Court have jurisdiction over a *res* (if there were any) and any right to control and dispose of it. On the other hand, since the action in the Federal Court is solely to compel the trustees to account and to remove them for their personal misconduct, that action could not interfere in any way with the (alleged) *res* which the State Court action undertook to get from Gerald and give to the trustees.

Moreover, even if it also be assumed for the sake of argument, that there is a *res* in the Federal Court action also, that *res* would be altogether different from the (alleged) *res* which the State Court action sought to get from Gerald and deliver to the trustees. The latter *res* could only be Gerald's money; whereas the former could only be the trust property in the hands of the trustees.

See opinion of Judge SCHOONMAKER, Appendix A hereto.

E.

In any event, the State Court had no right or power to enjoin the action in the Federal Court.

Although cases may be found where a Federal Court has deferred to a previously acquired jurisdiction by a State Court of an action *in rem*, it is for the Federal Court and not for the State Court to decide that question.

We have found no case where either this Court or a lower Federal Court has held that a State Court may enjoin proceedings in a Federal Court.

Many cases state the general or theoretical rule that the court which first acquires jurisdiction of an action *in rem* retains jurisdiction to the exclusion of any other court (*Kline* v. *Burke Constr. Co.*, 260 U. S. 226); but we have found no case where this Court has recognized the right of a State Court to *enjoin* a Federal Court action even though the State Court action be *in rem*. The proper procedure is to apply to the Federal Court for a stay of the Federal Court action pending the final determination of the State Court action.

It was so held in the leading case of *Freeman* v. *Howe*, 24 How. 450. There this Court said (p. 459):

> "But the question is, which tribunal, the Federal or State, possesses the power to determine the question of jurisdiction or validity of the process? * * * We regard the question as settled * * * that it belongs to the Federal Courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most careful and deliberate consideration, in the opinion of the present Chief Justice, in the case of the *United States* v. *Booth* (21 How. 506)."

A similar expression is found in *Moran* v. *Sturges*, 154 U. S. 256, where this Court said (p. 286):

> "That the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance; that the District Court had jurisdiction and that the judgment under review was in effect an unlawful interference with proceedings in that Court."

Rose's Notes (Revised Edition), Vol. 5, contains the following footnote to *Freeman* v. *Howe, supra* (p. 474):

> *"It belongs to Federal courts to determine question of their own jurisdiction, the Supreme Court being the ultimate arbiter.*
>
> "Approved in Nashville *v.* Cooper, 6 Wall. 253, 18 L. Ed. 853, holding Federal court had jurisdiction where acts complained of were done under military authority of United States; Fitzgerald *v.* Fitzgerald & Mallory Constr. Co., 44 Neb. 495, 62 N. W. 910, declining to review finding of Federal court that latter had no jurisdiction of case."

In the *Fitzgerald* case just referred to, the Supreme Court of Nebraska declined to examine the grounds for a conflict of jurisdiction and said (44 Neb. 495):

> "It is a sufficient answer that in all cases of apparent conflict between the state and federal courts the latter are the exclusive judges of their jurisdiction over the subject of the action (*Freeman* v. *Howe*, 24 How. (U. S.) 459)."

See also *Hines & Hobbs* v. *Rawson*, 40 Ga. 356; and *Shelby* v. *Bacon*, 10 How. 56, 70-71.

In *Central National Bank* v. *Stevens*, 169 U. S. 432, this Court, in reversing a determination of the Court of Appeals of New York affirming an injunction granted by the Supreme Court of that State against certain proceedings in the Federal Court, acknowledged the gen-

eral rule that "the courts of one country", having the necessary parties before them, may in equity enjoin such parties from proceeding with a suit in the courts "of another country"; but this Court, quoting from Story's Eq. Jur. § 899, said (p. 463):

> "The learned judge overlooked the passage immediately following, and hereinbefore quoted: 'There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.' Nor did the decision of this court in *Peck* v. *Jenness*, already cited, receive attention, wherein it was said, after adverting to the proposed distinction between enjoining a court and enjoining suitors therein, 'The fact that an injunction issues only to the parties before the court and not to the court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'"

In *American and English Annotated Cases*, Vol. 11, there is the following statement (p. 744):

> "The general rule that there is no authority in the state courts to enjoin proceedings in the courts of the United States has been laid down definitely and distinctly in numerous decisions."

In the case at bar the Federal Court has not only held that the action in the State Court is not an action *in rem* but that such action has been terminated, and that the Federal Court has jurisdiction of the action before it.

Jurisdiction having been properly invoked in the Federal Court, the Federal Court is bound to determine the issues raised in that action. In *Commonwealth Company* v. *Bradford*, 297 U. S. 613, 618, this Court said:

> "Jurisdiction having been properly invoked (in the Federal Court) it became the duty of the trial court to determine the issues, unless required by rules based on comity to relegate the complainant to the state court." (Matter in parentheses inserted.)

Here again is a recognition that the matter of jurisdiction is one for the Federal Court alone to determine. That Court, as a matter of comity, may surrender jurisdiction where a prior action *in rem* has been commenced in the State Court, but that is altogether different from saying that the State Court may *force* comity upon the Federal Court by injunction. Any such holding would, in effect, give to the State Court *appellate* power over the Federal Court on every question of comity arising in the Federal Court for *its* decision.

CONCLUSION

The final decree of the Supreme Court of Pennsylvania dated March 21, 1938, should be reversed and the injunction dissolved.

Dated, November, 1938.

Respectfully submitted,

CHARLES H. TUTTLE,
R. MURRAY GIBSON, JR.,
GERALD J. CRAUGH,
Counsel for Petitioners.

APPENDIX A

(Opinion of Federal Court)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA

PRINCESS LIDA OF THURN AND TAXIS, a Citizen of the Kingdom of Hungary; and JOHN PURCELL FITZGERALD, a Citizen of the State of New York,

v.

ANDREW A. THOMPSON, WILLIAM W. PARSHALL and ROBERT H. ARNETT, Trustees for the Plaintiffs and others, and JOHN S. HARAH and SECOND NATIONAL BANK of Uniontown, Pennsylvania, A Corporation Created and Existing under the laws of the United States, Administrators of the Estate of G. S. Harah, deceased, former Trustees for the Plaintiffs and others, all of whom are citizens of the Commonwealth of Pennsylvania.

No. 2451 Equity

OPINION

(Filed Mar. 21, 1938)

SCHOONMAKER, *Judge*:

This is an action in equity wherein plaintiffs, as beneficiaries under a trust created by agreement dated Decem-

ber 6, 1906, between Gerald Purcell Fitzgerald of the first part; Lida Eleanor Purcell Fitzgerald of the second part; and Josiah V. Thompson, Gerald Purcell Fitzgerald, and Charles E. Lenhart, Trustees, of the third part, charge the defendants Andrew A. Thompson, William W. Parshall, and Robert H. Arnett, the present trustees under said agreement, and John S. Harah and the Second National Bank of Uniontown, Pennsylvania, Administrators of G. S. Harah, deceased, who was a former trustee under said agreement, with mismanagement of the trust-estate created pursuant to said agreement, the loss of money through illegal and negligent conduct in the making of loans and investments from said funds, and ask that they be required to restore all moneys lost through negligence to the trust fund, that they be removed as trustees, and that all trustees appointed be required to give bond for the faithful discharge of their duties.

The defendants answer, denying all misconduct and negligence, averring that the Court of Common Pleas of Fayette County, Pennsylvania, first acquired and still retains sole and exclusive jurisdiction to hear and determine all matters of which the plaintiffs complain by reason of the pendency in that court of a suit in equity at No. 618, filed on October 27, 1910, between Josiah V. Thompson, *et al.*, as plaintiffs; and Gerald Purcell Fitzgerald, *et al.*, as defendants.

We set the case down for trial solely on the jurisdictional question. On this trial, an exemplified copy of the record in the Fayette County Court of Common Pleas case was introduced in evidence. By the record, it appears that Josiah V. Thompson, as trustee for Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald, and Gerald Purcell Fitzgerald; and Lida Eleanor

Purcell Fitzgerald in her own right; John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*, brought suit against Gerald Purcell Fitzgerald, individually and as trustee of the trusts described in the bill of complaint; Charles E. Lenhart, as trustee of the trusts described in the bill of complaint; Gerald Purcell Fitzgerald and Charles E. Lenhart, partners as Fayette Coke Company and Shamrock Supply Company; and Charles E. Lenhart, manager of Fayette Coke Company and Shamrock Supply Company.

This suit is based on the agreement made on the 6th day of December, 1906, between Gerald Purcell Fitzgerald of the Island of Waterford in Ireland, of the first part; Lida Eleanor Purcell Fitzgerald, of the second part; and Josiah V. Thompson, Charles E. Lenhart, and said Gerald Purcell Fitzgerald, as trustees, of the third part. This agreement recites that Lida and Gerald were married in the year 1899, and that the following children were born as the issue of said marriage, to-wit: John Purcell Fitzgerald; Edward Maurice Fitzgerald; and Gerald Purcell Fitzgerald; that Lida was divorced from Gerald by decree of divorce, *a mensa et thoro*, on December 5, 1906, by the High Court of Justice in Ireland. The agreement then provides for alimony payments by Gerald to Lida pending an absolute divorce by Act of Parliament, and provides thereafter for certain payments to the trustees named in the agreement for the benefit of Lida and the children from profits accruing from operation of Fayette Coke Company and the Shamrock Supply Company.

In that suit at No. 618 in Equity in the Fayette County Court of Common Pleas, the bill of complaint set out this trust agreement of December 6, 1906, and charged that the defendant, Gerald Purcell Fitzgerald, had violated the trust

agreement in that he had forbidden Lenhart, manager of the properties of the Fayette Coke Company and the Shamrock Supply Company, to pay over to the trustees provided in said agreement, the sums contemplated and set apart by the terms of said agreement, and that he had wholly repudiated said agreement. The bill further charged that the defendant Lenhart had carried out said instructions from defendant Fitzgerald and had failed to discharge his duties as a trustee under said agreement.

The bill of complaint in that case contained the following prayers for relief:

(The Court then sets forth in full the prayer for relief which, for the sake of brevity, is omitted, as it is printed at pages 31-32 of the record.)

Issue having been joined by answers filed by the defendant, the Court of Common Pleas of Fayette County proceeded to a trial of the issues joined, and thereafter entered the following decree:

(The Court then sets forth in full the decree of March 15, 1911, which is printed at pages 92-94 of the record.)

Thereafter, and on March 5, 1915, the Trustees and defendant Fitzgerald presented their petition to the Court of Common Pleas of Fayette County, setting up an alteration in the original agreement of December 6, 1906, and praying for a modification of the decree of March 15, 1911, to correspond therewith. Whereupon, the following consent-decree was entered:

(The Court then sets forth in full the decree of March 5, 1915, which is printed at pages 99-101 of the record.)

On May 25, 1925, the Trustees acknowledged receipt by them from defendant Fitzgerald of all moneys which he was required to pay by any decree entered in the Fayette County Court of Common Pleas and satisfied said decrees in full of debt, interest and costs. This satisfaction was filed in that court on June 3, 1925.

The Trustees have filed in the Court of Common Pleas of Fayette County two financial reports of the operation of their trust, one December 7, 1925, which was confirmed by the court, no exceptions being filed thereto; and one on July 7, 1930, to which exceptions were filed by Gerald Purcell Fitzgerald. The court has taken no action with reference to these exceptions.

On May 1, 1937, the present trustees filed a petition in the Fayette County Court of Common Pleas, asking that court to enjoin the plaintiffs in the instant suit from prosecuting this action in this court.

A rule to show cause was granted by that court why this injunction should not issue, and after hearing, the court, on June 29, 1937, made the rule absolute, stating in an opinion filed by Hudson, *P. J.*, in part as follows:

> "The position of the trustees is that the institution of the original action, the various proceedings had therein, and the several decrees entered, conferred upon this court complete and exclusive jurisdiction, and that as a result no court of co-ordinate jurisdiction may interfere with the subject matter of the litigation. In other words, they claim that the funds involved are trust funds; that they were in effect created by the decrees of this court; that this court has the constructive possession and potential control thereof, and that the administration of the funds is exclusively within the control of this court.
>
> "The three judges who heard the argument are in accord with that view and accordingly the rule was made absolute.

> "These funds are an entity, a thing, or res; they are a trust fund held by the trustees for the use of beneficiaries, and are to be administered and distributed only by the trustees. Obviously, an action having these funds as the subject matter and dealing with their administration is in rem."

The plaintiffs in the instant suit thereupon, on July 6, 1937, entered an appeal from the order of the Fayette County Court to the Supreme Court of Pennsylvania, where the case is now pending and undecided.

In our view, the proceedings in the Court of Common Pleas of Fayette County were not in *rem* or *quasi in rem*, but were rather *in personam* for the specific performance of the agreement of December 6, 1906, by defendant Fitzgerald and his co-defendant Lenhart, who, acting with him as one of the trustees under the agreement, were trying to repudiate that agreement, and not to comply with its terms.

When the decrees of that court were completely satisfied by the trustees on May 25, 1925, then the jurisdiction of the Court of Common Pleas of Fayette County was at an end. From then on, the trustees would function, not under the guidance of the court as in a receivership case, but under terms of agreement of trust of December 6, 1906, as modified by the subsequent agreement of March 5, 1915. No court action would be necessary to enable the trustees to carry out fully the terms of the trust, and to dispose of the property when the trust was terminated, for that was all provided for by the trust-agreements. True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust-agreement for filing such accounts in court, nor is there any provision in the decrees of the court for such accounts to be filed.

We, therefore, cannot see that the court acquired any jurisdiction over the *res* of the estate merely by the fact that the trustees filed such accounts in the Court of Common Pleas.

Any subsequent charges of mismanagement or misconduct on the part of the trustees would be the subject of the court inquiry only when jurisdiction was invoked by some party aggrieved by such mismanagement or misconduct.

Even had the Court of Common Pleas of Fayette County taken possession of the property involved in the trust agreements, its jurisdiction would be exclusive only so far as necessary for that court's control and disposition of the property. The latest word on this subject comes from the Supreme Court of the United States in the case of U. S. *v.* Philip Klein, Escheator, No. 439, decided February 28, 1938, involving the escheat of money deposited in the registry of a Federal court. There, Mr. Justice Stone, delivering the opinion of the court, says:

> "While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. Penn General Casualty Co. *v.* Pennsylvania, 294 U. S. 189; see Leadville Coal Co. *v.* McCreery, 141 U. S. 475, 477. Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. Penn General Casualty Co. *v.* Pennsyl-

vania, supra; see Feidritter v. Elizabeth Oilcloth Co., 112 U. S. 294, 304; cf. Buck v. Colbath, 3 Wall. 334, 342; Riehle v. Margolies, 279 U. S. 218. Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. Yonley v. Lavendar, 21 Wall. 276; Byars v. McAuley, 149 U. S. 608, 620; Security Trust Co. v. Black River National Bank, 187 U. S. 211, 227; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 43, 46; Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 619; General Baking Co. v. Harr, 300 U. S. 433."

Therefore, there being diversity of citizenship and the requisite amount being involved, we hold that this court has jurisdiction to hear and determine the issues raised by the pleadings in this case. The case may be set down for trial on the equity-calendar.

Appropriate findings and an order may be submitted accordingly.

APPENDIX B

(Satisfaction Filed in State Court on June 3, 1925 of all Decrees of That Court)

IN THE

COURT OF COMMON PLEAS OF FAYETTE COUNTY

Between

J. V. THOMPSON, *et al.*,
Plaintiffs,

and

GERALD PURCELL FITZGERALD, *et al.*,
Defendants.

No. 618
In Equity

We, WILLIAM W. PARSHALL, G. S. HARAH and A. A. THOMPSON, trustees, duly appointed by sundry decrees entered by the said court in the said cause, duly qualified and acting, hereby acknowledge payment by Gerald Purcell Fitzgerald, one of the defendants, of all sums of money which he by any decree entered in the said cause was required and commanded to pay, and in consideration thereof we hereby satisfy the said decrees in full of debt, interest and costs.

Witness our hands and seals, this 25th day of May, 1925.

WILLIAM W. PARSHALL Seal
G. S. HARAH Seal
A. A. THOMPSON Seal

Signed, Sealed and Delivered in the presence of:

Charles L. Lewellyn
E. C. Higbee

Before me, a notary public in and for said county and state personally came the above named WILLIAM W. PARSHALL and A. A. THOMPSON and in due form of law acknowledged the foregoing satisfaction of decree to be their act and each of their act and deed as trustees, and desired that it be recorded as such.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal this 25th day of May, 1925.

CHARLES L. LEWELLYN
Notary Public
My Commission expires February 8, 1927.

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Supreme Court of the United States

October Term, 1938

No. 118

PRINCESS LIDA OF THURN AND TAXIS, formerly Lida Eleanor Purcell Fitzgerald, and JOHN PURCELL FITZGERALD

Petitioners

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the Trusts hereinafter described, *et al.*, etc.

PETITIONERS' REPLY BRIEF

CHARLES H. TUTTLE
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Supreme Court of the United States

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Petitioners,

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the Trusts hereinafter described, *et al.*, etc.

PETITIONERS' REPLY BRIEF

I

The Questions Involved

The respondents must base the right of the State Court to enjoin the petitioners from proceeding with their Federal suit either (1) on the subject matter of the 1910 suit or else (2) on the so-called proceedings in the State Court which were docketed under the title of that suit after the judgment in that suit was completely satisfied and the mortgage given by the settlor concededly "paid and satisfied" (Rec. p. 150).

We challenge both these alleged sources of the alleged jurisdiction of the State Court to enjoin.

(1) If such jurisdiction be sought in the subject-matter of the 1910 suit, then the question is not whether the Court of Common Pleas had jurisdiction to make the orders (mostly *ex parte*) which it had made prior to the commencement of the suit in the Federal Court on July 8, 1930. On the contrary, the question is whether the State Court had jurisdiction to make, in the original 1910 action, *the order of June 29, 1937*, restraining these petitioners from the further prosecution of their Federal suit (Rec. pp. 104, 113, 116).

The petitioners clearly were within the Federal statute allowing suit in the Federal Court. There were both diversity of citizenship and the jurisdictional amount (Rec. p. 122).

At that time, the State Court had no fund *in custodia legis*. The power to appoint new trustees was expressly conferred *by the agreement of 1906* on the surviving trustees (Rec. p. 14); and counsel for respondents admitted on the argument that such an appointment was valid without subsequent judicial confirmation. Hence, the subsequent *ex parte* and *pro forma* confirmation by the court was merely gratuitous or precautionary, and could create no jurisdiction (not otherwise existing) to make the injunctive order of June 29, 1937.

Thus, the question is not whether the State Court could have entertained any suit for a voluntary or involuntary accounting, or could have restrained any interference with its jurisdiction of such a suit when lawfully perfected. No such suit was ever brought, and no such jurisdiction was ever perfected.

The State Court's injunctive order of June 29, 1937, professed to be made *in the old 1910 suit* (Rec. p. 113). It declared itself founded upon a petition of the substituted trustees, which petition recites (Rec. p. 104):

> *"This action was instituted October 27, 1910, by a bill entitled"*, etc.,

Indeed, the opinion of the Common Pleas granting the injunction opens with the statement (Rec. p. 116):

> *"The bill in this proceeding was filed October 27, 1910, and the cause has been since pending in this court."*

We challenge the correctness in law of the second half of the sentence. When the judgment in that action had been satisfied by full compliance therewith by the judgment debtor and his obligations under the 1906 agreement had thus been fully discharged on or before May 25, 1925, the only cause of action stated in the 1910 bill of complaint had been fully discharged, and there remained in the State Court no jurisdiction to be thereafter the sole and exclusive arbiter of *future* charges of *future* wrongdoing against *future* trustees for the whole *future* of the life of the trust.

A suit is not "pending" after judgment is entered and fully satisfied. (*Central National Bank* v. *Stevens*, 169 U. S. 432, 464).

(2) But even if this be otherwise, nevertheless the old 1910 suit could be still "pending" in 1937 only for the purposes for which it was brought. It could not be a perpetual grant to the State Court of exclusive jurisdiction over all future controversies between the parties or their successors. The purpose for which the 1910 suit was brought is obvious, to wit: *specific performance* by the settlor of the trust. Indeed, it was expressly so declared by the State Court itself in its opinion in 1911, granting the complainants a decree (Rec. p. 59):

> "In view of which facts and conditions (*i. e.* repudiation by the settlor), this proceeding was instituted and a bill of complaint filed setting forth sufficient of the situation and of the foregoing

facts to give this Court, sitting in Equity, jurisdiction; the prayer for relief is rather lengthy, consisting of seven paragraphs, but it can be condensed and the material substance of it expressed in one word, viz: '*performance*'".

Furthermore, the State Court in its 1911 opinion defined as the only issues, the following (Rec. p. 52):

(1) Is the 1906 agreement void, as claimed by the settlor?

(2) Did "*it* create a lien" on the settlor's property?

(3) If the agreement is valid, should the settlor be removed as trustee because of his repudiation of it?

The opinion thereupon discusses and decides these issues as issues solely between the settlor on the one hand and the other trustees and the beneficiaries on the other (Rec. pp. 52-92).

Plainly, therefore, that was the sole and only jurisdiction assumed by the State Court in 1910 according to its own definition thereof, and plainly that was the sole and only cause of action pleaded in the 1910 bill of complaint.

In consequence, the question here is how can that 1910 suit which went to judgment and satisfaction five years before the Federal suit was begun, give the State Court such exclusive jurisdiction over future wrongs (not pleaded in the 1910 bill and subsequently committed by future persons not parties to that suit), as to entitle that court to make *in that suit* an order in 1937 enjoining those petitioners from suing in the Federal Court such future persons for such future wrongs?

3. On the other hand, if jurisdiction for the State Court's injunctive order of June 29, 1937, be sought in the events shown on the docket after the decrees of the State Court in the 1910 action had been satisfied "in full of debt" and the mortgage "paid and satisfied" (Rec. p. 150, and Appendix B attached to our Main Brief), the following questions then arise:

(1) When did such jurisdiction begin?

(2) How could it have existed prior to the institution of the Federal suit on July 8, 1930?

(3) How and when could the 1910 suit in the State Court become a sort of suit in perpetuity, conferring on the State Court continuing and exclusive jurisdiction over all future controversies?

These questions are discussed in the ensuing Points of this Brief.

II

Shelby v. _Bacon_, 10 How. (U. S.) 56, is conclusive that, under the Pennsylvania law, the mere filing of the partial account on July 7, 1930, did not constitute institution of a suit by the trustees (—certainly not one _in rem_—), and did not confer exclusive jurisdiction on the State Court, and did not bar institution of the Federal suit on the following day.

The docket entries on pages 6 and 7 of the Record show that on October 9, 1925, the then trustees presented a "financial report to the Court"; that on December 2 and 5, 1925, "Affidavit of Publication filed"; and that on December 7, 1925, "no exceptions having been filed", the report and the partial account therein were "confirmed absolutely."

Page 7 of the Record further shows that on July 7, 1930, a "Second and Partial Account" was filed. *Nothing else was done on that day.* There is no mention of any publication or of the filing of any affidavit of publication, or of the issue of any process then or at any later time. All that appears is that *beginning several weeks later* several *ex parte orders* were successively made extending the time to file exceptions, and that on February 16, 1931, exceptions were filed by one Gerald Purcell Fitzgerald (not one of these petitioners). These exceptions appear never to have been made the subject of any determination.

The bill of complaint in the Federal Court was filed July 8, 1930 (Rec. pp. 160, 162, 173).

At page 111 of the Record there is the sworn statement of the Princess Lida in the Federal Court as follows:

> "Respondent avers that any accounts of Petitioners now pending in the Court of Common Pleas of Fayette County, Pennsylvania, sitting in Equity, have been ex parte proceedings, *and have been filed without notice to Respondent and the other beneficiaries of the trusts involved.*"

The Federal Court expressly found (Opinion, Appendix A, p. 28):

> "True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust agreement for filing such accounts in Court, nor is there any provision in the decrees of the court for such accounts to be filed."

On the argument, opposing counsel contended that the filing of these accounts constituted institution of an accounting suit and that this gave the Common Pleas Court plenary and exclusive jurisdiction. Both the premise and conclusion of this argument are mistaken.

Aside from the fact that acquisition of jurisdiction over these petitioners by the service of process is not shown, the mere filing of the account on July 7, 1930, did not constitute the institution of any suit or confer exclusive jurisdiction as against the Federal suit and did not and could not bar the jurisdiction acquired by the Federal Court through the filing of the bill of complaint on the following day.

This was the explicit interpretation of the Pennsylvania law adopted by this Court in a substantially identical situation in *Shelby* v. *Bacon*, 10 How. (U. S.) 56.

There, under the Pennsylvania Statute authorizing trustees and assignees for the benefit of creditors to file accounts with the prothonotary's office of the court, assignees of a Pennsylvania bank filed an account which was confirmed by the Court. Subsequently, a citizen of Kentucky filed in the Federal Court in Pennsylvania a bill against the assignees "*for an account of the trust* and for the payment of complainant's debt in full or a distributive share thereof" (p. 57). The assignees challenged the jurisdiction of the Federal Court and pleaded in abatement and in bar the State Court's prior "confirmation" of their accounts and the alleged prior and exclusive jurisdiction of the State Court.

Thus, the precise question which we have here was presented. The Federal Court held that the proceedings in the State Court did not constitute a suit *in rem* and did not give the State Court primary, much less exclusive, jurisdiction, and that the Federal Court had jurisdiction to proceed.

These rulings were confirmed by this Court which said (pp. 70-71):

> "*It (the proceeding in the State Court), is not strictly a proceeding in rem.* The proceeding is in-

tended to adjust the rights of debtors and creditors of the Bank, beyond the jurisdiction of the State of Pennsylvania. Citizens residing, perhaps, in a majority of the States of the Union are debtors or creditors of the Bank. It is difficult to perceive by what mode of procedure the State of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated. From the plea, it does not appear that any notices have been given, or citations issued, as authorized by the Statute. Nothing more seems to have been done by the assignees than to file their accounts, have them referred to auditors, and finally sanctioned by the court. Whether this procedure is evidence of a faithful discharge of the trust so far as the accounts have been so adjusted, it is not necessary to inquire. We suppose that it could not be contended that fraud or collusion might not be shown to avoid the proceeding before any tribunal having jurisdiction."

"*No suit seems to be pending in the Common Pleas.* The action of the assignees appears to be voluntary, for their own justification, and not in obedience to any order of the Court. By the Statute, any person interested may, on application to the Court, obtain a citation to the assignees to appear and answer. But this is nothing more than the ordinary exercise of a Chancery power to compel them to account. And it is only an exercise of jurisdiction over them from the time the bill is filed and a notice served, or the application for a citation is made on due notice. *If no such proceeding is had, the assignees, it would appear, file their accounts or omit to do so at their pleasure.*"

The nature of the questions certified to this Court by the Circuit Court is shown by the Order entered by this Court on the foregoing opinion. Such order appears at the end of the opinion of this Court, and the pertinent portions thereof are as follows:

"On consideration whereof, it is the opinion of this court, 1st. That the facts stated in the amended plea to the amended bill filed by John Bacon, Alexander Symington and Thomas Robins, do not deprive the said Circuit Court of jurisdiction of this case, 2d. That the facts stated in the plea to the amended bill filed by the defendants James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope and Thomas S. Taylor do not deprive the said Circuit Court of jurisdiction of this case.".

III

The doctrine of *Shelby* v. *Bacon* has been constantly applied to accounting actions; and, unless there is property in the custody of the State Courts, the right of a nonresident to his statutory remedy in the Federal Court has been invariably upheld.

A leading example of the application of *Shelby* v. *Bacon* to accounting actions is *Powers* v. *Blue Grass Bldg. & Loan Assn.*, 86 Fed. 705. There a corporation had made an assignment to one Clay for the benefit of creditors. Under the Kentucky statute the assignee was required to give a bond in the County Court and to submit his accounts to that court. He also had the statutory right to apply to that court for directions. Under that statute, the assignee did file in the County Court a petition "for direction in the conduct of his trust and for settlement of his accounts." Thereafter certain stockholders brought suit in the Federal Court to set aside the assignment to him and to restore the assets to the corporation; and they applied therein to the Federal Court for a receiver *pendente lite*.

The Federal Court cited *Shelby* v. *Bacon*, and granted the application for appointment of a receiver, holding that

the proceedings by the assignee in the State Court had not as yet resulted in the passing to the State Court of any property but remained merely an ordinary proceeding by the assignee of the assets for a voluntary accounting. The Federal Court (LURTON, *C. J.*) said (p. 709):

> "He (the assignee for creditors) remained in possession of the res after he filed that petition as assignee under the deed, and not under any appointment by or authority from the circuit court. * * * The object of that petition was to administer his trust under the advice and direction of that Court. He submitted to it the construction of the deed and the rights of the different classes of shareholders for adjudication, and brought before the court as defendants one of each class to stand for and represent the class in settling rights under the deed inter sese. *The pendency of that suit has not placed the property of the association in grimeo legis.* Clay is just as completely in possession of the assets as he was the day before his suit was filed. He is in possession as assignee, and not as a mere hand of the court."

This decision and language are squarely applicable to the present case, because even if the act of the trustees in filing their second partial account on July 7, 1930, constituted the commencement of an accounting suit, no property was thereby placed "*in grimeo legis*", and the trustees remained "as completely in possession of the assets" as they were the day before such supposed suit was begun. Their possession was as trustees under the 1906 agreement and "not as a mere hand of the court."

In *Andrews* v. *Smith*, 5 Fed. 833, in a Federal suit by the first mortgage bondholders of a railroad against the mortgage trustees for an accounting of the trust funds, the defendants pleaded that during the period of the ac-

counting called for they had been in possession of the railroad as receivers for the Vermont Court of Chancery, and as such receivers had already rendered an account to that court for the sums claimed in the Federal suit. They also pleaded that no order discharging them as receivers of the State Court had ever been entered. Nevertheless, the Federal Court held that the receivership action in the State Court had practically ceased prior to the institution of the Federal action; and further held that a certain compromise agreement which had been made in the State Court and confirmed there by a decree adjudging it legal and binding on all parties interested in the railroad did not exclude the Federal court from assuming jurisdiction. To quote the opinion of WHEELER, *D. J.* (p. 840):

> "The putting the agreement in the form of a decree added nothing to the force and effect which the agreement would otherwise have."

This language fits directly the decrees of 1911 and 1915 in the present case.

Judge WHEELER then cited *Shelby* v. *Bacon*, 10 How. 56 (p. 842) and a number of other decisions by this Court, and deduced therefrom the rule (p. 844):

> "Unless the Court of Chancery had jurisdiction of this matter, *because these funds were in the custody of that court*, the accounting being had is not, upon any mode of procedure, to bind those not expressly parties to it."

And Judge WHEELER further said (p. 841):

> "That the state court may have jurisdiction of some of the parties to this suit, concerning the property involved, for some purposes, would not necessarily exclude this court from cognizance of the same parties in a suit relating to the same property for other purposes."

Similar applications of the doctrine of *Shelby* v. *Bacon* will be found in

Griswold v. *Central Vt. R. Co.*, 9 Fed. 797, 799;
Fleisher v. *Greenwald*, 20 Fed. 547, 550.

IV

The suit begun in the Federal Court by the filing of the bill in equity on July 8, 1930, had priority in point of time over any accounting proceedings which may have followed the filing of the partial account on July 7, 1930.

The Federal Court was the first to acquire jurisdiction.

The bill in equity was filed in the Federal Court on July 8, 1930. (See admission in Respondent's Brief, p. 5, and Rec. pp. 160, 162, 173.) By that act, as is elementary, the jurisdiction of the Federal Court was then invoked and immediately attached without more.

In *Farmers' Loan & Trust Co.* v. *Lake St. Rd. Co.*, 177 U. S. 51, this Court said (p. 60):

> "The contention that the jurisdiction of the state court first attached because, although the suit therein was not commenced till after the commencement of the suit in the Federal court, the summons issued by the state court was served before the service of the writ of subpoena issued by the Federal court, is not well founded.
>
> "*A suit in equity is commenced by filing a bill of complaint.* Story's Equity Pleading, sec. 7, fourth edition."

Furthermore, the trustees admit that they were duly served with process on the Federal bill (Rec. pp. 160, 162).

On the other hand, on the state side, all that happened at that time was the mere filing of a "second and partial account" on July 7, 1930 (Rec. p. 7).

There is no mention or claim of the presentation to the State Court of any petition or the making by it of any order on that day or on the following day.

The only reference to a petition which refers to the account is in the following entry on the docket (Rec. p. 7):

> "And now, to-wit, the 26th day of July, 1930, the petition presented in open Court and ordered to be filed, and it is further ordered that the time for filing Exceptions to the said account be extended as to all parties in interest to 15 days after the disposition of the petition."

The only notation as to the filing of exceptions is under date of February 16, 1931, and mentions exceptions then filed by one Gerald Purcell Fitzgerald, not one of these petitioners (Rec. p. 8).

The mere filing of the account on July 7, 1930, unaccompanied by the presentation of any petition or the issue of any process, did not institute a suit or confer any jurisdiction on the State Court,—much less an exclusive jurisdiction which would exclude the jurisdiction of the Federal Court attaching the next day. See next Point.

The burden of showing an exclusive and prior jurisdiction in the State Court is on the Respondents.

These Petitioners exercised their statutory right to sue in the Federal Court. The jurisdictional requirements were all met.

Hence, the burden was and is on the Respondents to show the right and power of the State Court to enjoin the Petitioners from exercising their lawful statutory right.

The Respondents cannot discharge this burden by mere guesses or assumptions or by going outside the Record. They cannot build up such an exclusive jurisdiction in the State Court by mere argument or speculation not sustained and proven by actual facts and proceedings plainly shown in this Record.

V

Under the Pennsylvania statute the mere filing of a partial account by trustees does not work the immediate institution of a suit or the immediate creation of present jurisdiction in the Court.

The subject of "Trusts and Trustees Generally" is covered in Title 20 of Purdon's Pennsylvania Statutes Annotated, sections 2741 to 3291.

The "voluntary settlement of accounts" is dealt with in section 2925. This requires an order of the Court granting "leave" and the presentation of a petition for an order for the issue and service of citation to and upon all persons interested in the estate.

This section expressly provides that, after "leave" first obtained, and after the account has been "filed in the office of the prothonotary of the court," "the like proceedings shall be had thereon as in the case of a settlement of such accounts after citation."

This refers back to section 2833, entitled "Citation to settle accounts." That section requires "*the application by bill or petition setting forth the facts,*" and the making thereon of an order "to issue a citation" to those in interest to answer the bill or petition.

Until such petition is presented and process ordered, no suit is deemed begun and no jurisdiction has been

acquired or constitutionally could be acquired (*Miller's Estate*, 10 W. N. C. 81).

In the present instance, the record does not show the presentation of any such petition or the obtaining of any leave or the making of any order for the issue of citation, before the institution of the federal suit on July 8, 1930; and it does not show the service of any citation upon these Petitioners at any time. They have positively denied such service and any notice of the filing of these two "partial accounts" (Rec. p. 111).

VI

The argument in Respondents' brief that the trust fund was "created by the decree of the State Court" is erroneous and a mis-description.

The Respondents' brief at pages 16 and 17 states that "The lien was established by the original decree in this cause", and that "The Trust Fund" was "created by the decree of the State Court".

This is a mis-description.

The decision of the State Court rendered in 1911 stated the issue to be whether *the 1906 agreement* did "create a lien" (Rec. p. 52). The conclusion of the Court was (Rec. p. 90):

> "We are therefore of opinion and conclude that *the agreement of December 6, 1906, creates an equitable lien* on the individual interest of the said Gerald Purcell Fitzgerald of and in the said Fayette Coke Company".

The modifying decree of 1915, by permitting the settlor to substitute as security a mortgage in place of

this equitable lien did not "create a trust fund". The trust fund—and the only trust fund—was the *money* paid by the settlor to the trustees. The mortgage was merely security for his obligation to pay that money.

In short, it was the 1906 agreement and the modifying agreement on which the modifying decree of 1915 was expressly based (Rec. p. 97), which *created* the trust funds. The decrees merely *enforced* the agreement. (See cases cited under Point III, *supra*.)

Furthermore, as the respondents have expressly admitted in this Record (p. 150), all that money was paid over in full and in consequence *"the mortgage was paid and satisfied"* and the decrees satisfied years before the Federal suit was ever begun. (See also page 6 of our Main Brief.)

VII

There is nothing in the amended decree of 1915 which gave the State Court continuing and exclusive jurisdiction over all future wrongs by any future trustees during the entire future life of this trust.

The theory that the 1910 suit was a suit in perpetuity seems to us absurd.

On the argument respondents' counsel referred to the clause in the modifying decree of March 5, 1915, which declared that the sums paid into the fund shall be invested by the trustees "in good, safe interest-bearing, lawful and secure trust securities", and that the trustees shall apply the net income therefrom to the payment of the annuity, etc. (Rec. pp. 99-100).

But this clause was merely declaratory of the law and of the 1906 agreement, and a mere summary of the obli-

gations of the trustees under the 1906 agreement, for the carrying out of which *"according to the true intent and meaning thereof"*, the modifying decree professed itself to be made (Rec. p. 99).

This modifying decree was entered *ex parte*, merely upon a petition of the then trustees (Rec. p. 94). It merely gave expression to an amplifying agreement set forth in that petition (Rec. p. 97). There is nothing to show that the beneficiaries of the trusts were given any notice of that petition. The petition set forth an agreement between the settlor of the trusts and the then trustees for the substitution of a fixed mortgage in the place of the equitable lien created by the 1906 agreement (Rec. p. 97). All that the modifying decree did in substance was to confirm *by consent* that substitution. (See cases cited under Point III, *supra*.)

The clause thereof quoted by Respondents' counsel merely declares in substance that the trustees shall have as to the mortgage the same duties as they had as to the equitable lien.

The modifying decree does not create any fund *in custodia legis*. It does not convert the trustees into receivers of or for the Court. Their title and possession still rested on the 1906 agreement. The mere fact that it gave to the trustees certain directions which were declaratory of the law and inherent in the agreement did not convert the suit into one *in rem* or in perpetuity or bring any property into the custody of the Court.

The modifying decree expresses no reservation of jurisdiction for any purpose whatsoever. It does not order the trustees to account or refer to any account by them. Once again, all that the modifying decree added to the prior situation was a further definition of the duty and obligation of the settlor.

The modifying decree expressly so acknowledges, for it declares its sole purpose to be (Rec. p. 99):

> "that the same (the 1911 decree) may be better enforced and the provisions of said Indenture of December 6, 1906, carried out *according to the true intent and meaning thereof.*"

And the petition on which the same was based expressly declared that by the proposed modification (Rec. p. 98):

> *"the true intent and purpose of said paragraphs 2 and 3 of said Indenture will be effected."*

VIII

The decrees of 1911 and 1915 were fully satisfied, and the only cause of action which was pleaded and which these decrees purported to enforce was fully satisfied, on or before May 25, 1925.

On the argument respondents' counsel claimed that the equitable lien and the mortgage later substituted therefor was "a trust fund created by the State Court".

Not at all! These were mere security for the creation of the trust funds by and as provided for in the 1906 agreement.

The trust funds consisted of monies paid over to the trustees by the settlor, and when these had all been paid in full as required by that agreement on or prior to May 25, 1925, the equitable lien and the mortgage ceased and died.

To what we have said on this subject on page 6 of our Main Brief, we add the following admission *by the respondents* on page 150 of the Record:

"Pursuant to the said (1915) decree the payments therein required were made, the mortgage executed and delivered, the principal of the Children's Fund fully realized, *the mortgage paid and satisfied.*"

Dated, November 21st, 1938.

Respectfully submitted,

CHARLES H. TUTTLE,
R. MURRAY GIBSON, JR.,
GERALD J. CRAUGH,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 118

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*,

Plaintiffs,

and

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as Trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company, CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

BRIEF FOR RESPONDENTS

W. W. PARSHALL and E. J. ARNETT, two of the present Trustees for Petitioners and others and A. A. THOMPSON and JOHN S. HARAH, Administrator of G. S. HARAH, deceased, former Trustees, our petition of Princess Lida of Thurn and Taxis, formerly Lida Eleanor Purcell Fitzgerald, and John Purcell Fitzgerald for Writ of Certiorari to the Supreme Court of Pennsylvania.

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STATEMENT OF THE CASE.

The petitioner, LINA, PRINCESS OF THURN AND TAXIS, in 1899 was married to Gerald Purcell Fitzgerald, a resident of the Isle of Waterford, in Ireland (17 a). In 1906 the husband and wife instituted divorce proceedings against one another and by agreement dated December 6, 1906 (17 a) executed by them, Josiah V. Thompson and Charles E. Lenhart, Fitzgerald covenanted that after dissolution of the marriage, he would pay to Thompson, Lenhart and himself as trustees

(1) So much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company, partnerships operating in Fayette County, Pennsylvania and composed of Fitzgerald and Lenhart, as would yield an annuity of $15,000.00 per annum for three years and thereafter $20,000.00 per annum to be paid to the wife for life (18 a, 19 a);

(2) One-third of his share of the annual profits to be invested until there should accumulate the sum of $300,000.00, one-half of the income therefrom to be paid to the wife for life; the other half either to accumulate or to be expended for the benefit of the children; or the trustees in their discretion might pay the entire income to the wife until the eldest child attained the age of 21 years; as each child became 21 years, he was to receive his share of the income as of right, and on the death of the wife and after the youngest child attained the age of 21, the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children (19 a, 20 a).

The agreement provided that in the event of the death or resignation of any of the trustees, the two re

maining should appoint a successor, or on their failure to do so, either of them or the wife should have the right to petition the Court of Common Pleas of Fayette County, Pennsylvania to fill the vacancy (21 a). The wife agreed to relinquish all rights of dower and alimony (22 a) and the agreement contained certain provisions for the custody and control of the children (23 a).

The marriage was dissolved by Act of Parliament in 1907 (44 a) and the stipulated payments were duly made until 1910 (90 a). In that year a Bill in Equity was filed in the Fayette County Court by Thompson as trustee (15 a), the wife and three children by their guardian *ad litem*, against Fitzgerald and Lenhart as trustees, Fitzgerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the Court to remove Fitzgerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust Agreement and instruct the trustees accordingly, to require Fitzgerald and Lenhart, as members of the partnerships, to account for and pay into the Trust, or to a sequestrator or receiver to be appointed by the Court, the proper share of Fitzgerald's profits and make such subsequent accountings as might be necessary during the term of the Agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies (49 a, 50 a). Answers were filed to the Bill. That of Fitzgerald asked by way of counter-relief that the Agreement of 1906 be declared null and void, that Thompson be ordered to account to the Trust for monies received by

him and that he be removed from his office as trustee of the fund for the children (63 a). The suit culminated in 1911 in a decree which—affirmed on appeal by the Supreme Court of Pennsylvania, 233 Pa. 242, writ of error dismissed, 222 U. S. 555—ordered defendants to pay amounts then remaining due under the Agreement, adjudged the payments stipulated in the Agreement to be a lien on Fitzgerald's interest in the real estate owned by Fayette Coke Company, removed Fitzgerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000.00 should have accumulated in the fund for the children (140 a-142 a).

In the place of Fitzgerald, William M. Thompson was appointed trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed by the Court of Common Pleas of Fayette County in his stead (7 a). In the same year, Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Court of Common Pleas of Fayette County, alleging that disputes had arisen between them and Fitzgerald with regard to a proper construction of the Agreement as to the profits of Fayette Coke Company (143 a), and that an agreement had been reached whereby Fitzgerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during the period of seven years aggregating the sum of $400,000.00, these payments to be secured by a mortgage to the trustees on Fitzgerald's undivided interest in the real estate of the Fayette Coke Company. The

payments were to be invested by the trustees and the net income together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000.00, or such part thereof as had then accumulated, was to be returned to Fitzgerald, and the mortgage satisfied. The petition prayed the Court to modify the decree of 1911 so as to permit the new agreement to become effective (149 a). Accordingly the Court entered such a decree (151 a-154 a).

The fund of $400,000.00 was directed to be invested and re-invested by this decree, and the income realized therefrom used to pay to the wife the annuity of $20,000.00 in lieu of the arrangement under the agreement and former decree which simply required the trustees to collect from the Fayette Coke Company the sum of $20,000.00 annually and pay it over to the wife. The fund of $400,000.00 was completely paid into the hands of the trustees in 1925.

In 1918 the resignation of Josiah V. Thompson (8 a) and in 1919 that of Lenhart was presented to the State Court and it was ordered that they be discharged from further accountings (8 a). Their places were supplied by G. S. Harah and Andrew A. Thompson, these appointments being approved and confirmed by the Court (9 a).

In 1925 the trustees, Harah, Andrew A. Thompson and Parshall, filed their First and Partial Account in the State Court which was duly advertised and confirmed (9 a). On July 7, 1930 a Second and Partial Account of the Trust was filed (10 a), this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died on April 23, 1930, and Robert

J. Arnett was appointed to succeed Harah and his appointment was confirmed by the Court.

The present controversy had its inception with the filing of a Bill in Equity in the District Court of the United States for the Western District of Pennsylvania on July 8, 1930 by Princess Lida of Thurn and Taxis, the original Plaintiff who had remarried, a citizen of Hungary, together with her eldest son John, then a citizen of the State of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, all citizens of Pennsylvania (188 a).

The Bill alleged that there was in the wife's Alimony Fund upwards of $456,000.00 and in the Children's Fund upwards of $315,000.00, both of these sums including undistributed income, that among the investments in the Alimony Fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments for trust funds, improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the Trust Estate, had failed to render proper accounts, and were not fit persons to act as trustees (192 a-194 a). The Bill prayed that the trustees be required to file an account, that they be removed as trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties (194 a). A motion to dismiss the Bill was denied by the District Court (208 a-213 a), whereupon the trustees filed an answer alleging that the mortgages complained of were lawful investments, denied the allegations as to losses, mismanagement of

the estate and of failure to render accounts, and declared that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed in the Fayette County Court in 1925, and that another account had been filed July 7, 1930, the day before the Bill was filed in the District Court, which account was awaiting confirmation by the Fayette County Court (213 a-230 a).

Thereafter nothing was done with the equity proceedings in the Federal Court for several years. In April 1937 the petitioners here filed an amendment to the Bill in the Federal Court (230 a-236 a), specifying certain bonds and mortgages in the Trust Funds which they assert were illegal investments, alleging that the amount of the funds invested in mortgages was too great and for the prayer of the original Bill asking for the filing of an account, there was substituted one that the trustees be required to restore the funds, that is, the monies lost by their alleged illegal and negligent conduct. To the Amended Bill the trustees filed an answer (236 a-244 a), stating that all the bonds and mortgages challenged by the petitioners had been included in the account filed in the Fayette County Court in 1925, or in the one filed in 1930, and further alleging that to the account filed in 1930 exceptions had been filed which were pending in the Fayette County Court, and that while losses had occurred in some of the investments, accretions on others more than compensated therefor (236 a-244 a).

On May 1, 1937 the trustees filed a petition in the Fayette County Court setting forth that the prosecution of the suit in the Federal Court constituted an interference with the sole and exclusive jurisdiction of

the State Court, and prayed for a decree restraining the Princess and her son John from further prosecuting the Federal action (159 a-162 a). A rule to show cause why the restraining order should not be issued was allowed (164 a). The Princess filed answer alleging that the Fayette County Court never had control and possession of the trust funds, and that there was no controversy there pending when the Bill in Equity was filed in the District Court, that the accounts filed by the trustees were *ex parte* proceedings, and denying that the State Court had exclusive jurisdiction over the subject matter of the suit in the Federal Court (165 a-172 a).

On June 29, 1937 the State Court made the trustees' rule absolute and entered the decree enjoining the Princess and her son John from prosecuting the equity suit in the Federal Court (174 a).

On July 6, 1937, the Princess and her son John appealed to the Supreme Court of Pennsylvania, which Court affirmed the decision of the Fayette County Court (329 Pa. 497; 198 Atlantic 58; Appendix page 20).

On the same day John Fitzgerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County (246 a-249 a). An Answer was filed by the trustees (250 a), and the District Court on September 18th made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition (257 a). On July 19, 1937 the trustees filed in the Fayette County Court a Third and Partial Account of the two funds in trust to which exceptions were filed (13 a).

On the same date that the Supreme Court of Pennsylvania handed down an opinion affirming the action of the Fayette County Court, to-wit, March 21, 1938 (Appendix Page 20), the United States District Court for the Western District of Pennsylvania handed down an opinion (Petitioners' Appendix A) in which it held that the action of the State Court was an action in *personam* and not an action in *rem* or *quasi* in *rem* as was held by the Supreme Court of Pennsylvania. No findings of fact or final decree has ever been entered by the District Court (Petitioners' Appendix page 34).

ARGUMENT.

The fundamental question involved is whether the proceedings originally instituted in the state court in 1910 were in *personam* or *in rem* or *quasi in rem*. The Supreme Court of Pennsylvania held them to be of the latter nature. The District Court held them to be *in personam*.

Respondents' position in both Courts has at all times been that the state Court proceedings were *in rem* and that they had never terminated; Petitioners' position is that the proceedings were terminated in the State Court.

In

Peck v. Jenness, 48 U. S. 612, 624, 625, it was said:

> "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and * * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken

away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

As is said by Mr. Justice Stern of the Supreme Court of Pennsylvania from the judgment of which Court Petitioners are here appealing:

"In actions in rem the law is otherwise. 'It is settled that where a federal court has first acquired jurisdiction of the subject matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem, the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.' Kline v. Burke Construction Company, 260 U. S. 226, 229. In such cases, therefore, the rule is that the court which first acquires jurisdiction of specific property by the possession thereof, or by the commencement of a suit from which it appears that it is necessary to . determination of the controversy, or to the enforcement of the prospective judgment or decree, for the court to have control and dominion over the property, thereby withdraws it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and the court is entitled to retain such control as is requisite to effectuate its final judgment or decree free from the interference of every other tribunal. 'The res is as much withdrawn from the judicial power of

the other court as if it had been carried physically into a different territorial sovereignty.': Covell v. Heyman, 111 U. S. 176, 182. The tribunal whose jurisdiction first attaches 'holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted.': Taylor v. Taintor, 83 U. S. 366, 370."

To the same effect are

Byers v. McAuley, 149 U. S. 608,

Merritt v. American Steel-Barge Co., 79 Fed. 228, 231,

Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co., 177 U. S. 51,

in which it was stated (61):

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts,* (italics supplied) or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts."

The above language was quoted in

Palmer v. State of Texas, 212 U. S. 118, 129

At the risk of repetition, it may not be amiss to direct attention to the precise nature of this proceeding.

The cause was instituted by a Bill, the primary object of which was to charge specific property with a lien to secure the payment of certain sums out of the profits of a mining property against which the lien was sought.

The lien was established by the original decree in this cause. No payment was to be made directly to any beneficiary. The lien could be realized upon and enforced only by trustees and only through the medium of the trustees could the beneficiaries receive payment.

This lien was a thing, an entity, or res. It was itself a trust fund held by the trustees for the use of the beneficiaries, but to be administered and enforced only by the trustees.

In 1915 the character of this lien was radically changed. It was transmuted into a mortgage to secure the payment of $700,000.00 less a certain sum already accumulated.

Thus a genuine trust fund was created consisting of the mortgage and the then accumulations. The accumulations were to be invested and re-invested by the trustees, and as the mortgage was from time to time paid, the proceeds were to be likewise invested and reinvested. The trust is to continue during the lifetime of Lida, one of Petitioners. At her death it terminates. The principal of the alimony fund, $400,000.00, then becomes payable to Fitzgerald, who supplied the money or his heirs or assigns. The $300,000.00 then becomes distributable to the children, John, Gerald and Edward.

All the promises to pay out of profits of the business as contemplated by the original contract have been eliminated, and for them has been substituted a specific fund to be kept invested by the trustees during the continuance of the trust. It requires active and continuous administration. Out of the income realized from the investment of the principal, certain annual payments are to be made.

This is a trust estate, pure and simple.

At the death of Petitioner Lida, the trust terminates and there must be a final settlement. The principal fund will then be transferred in kind to the beneficiaries or converted into money and the proceeds distributed, or it may be that part of it may be set over in kind and the remainder sold.

The trust fund having been created by the decree of the State Court, by a voluntary submission of the parties to its jurisdiction, that Court has sole and exclusive jurisdiction over it and of its administration until final settlement.

This is the doctrine of the cases cited, and it here applies in its full vigor because this trust fund is itself a res, entity or thing of which that Court has potential control and constructive possession.

Matters of administration are questions arising in the course of this cause, and it was said in the Peck case (48 U. S. 612), "That when a court has jurisdiction it has a right to decide every question which occurs in the cause.".

In the Farmers' Loan case (177 U. S. 51) it is laid down that the rule is not restricted to cases where property has been actually seized, "but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates."

Here the suit was brought to establish a lien, and in its present status is the administration of a trust.

In that case it is further said that the rule applies to cases where "the court may be compelled to assume

the possession and control of the property to be affected."

Here the Court may be compelled, in order finally to settle this trust, to direct the sale of the trust property in whole or in part.

Actual physical possession is not necessary. In Harkin v. Brundage, 276 U. S. 36, it is predicated that "the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so."

The State Court has control of the property in question, for as is said in Wabash R. R. v. Adelbert College, 208 U. S. 38, the Court which first acquires control of property has "jurisdiction to hear and determine all questions respecting the control of the property", which precludes the jurisdiction of any Court of coordinate authority.

In Kline v. Burke Construction Co., 260 U. S. 226, it is declared that the effect of the doctrine is to "draw to the Federal Court (mutatus mutandi to the state court) possession or control, actual or potential, of the res and the exercise by the State Court of jurisdiction over the same res necessarily impairs and may defeat the jurisdiction of the Federal Court."

In

Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189,

it was said (195):

> "Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court

> having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other * * * But if the two suits are in rem, or *quasi* (Italics supplied) in rem, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other * * * The principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

The action in the State Court is clearly in rem and possession and control of the trust property is potentially in that Court. Because there is a res, the action is certainly not personal, and whether it be strictly in rem or only *quasi* in rem makes no difference as is set forth in the language of Justice Stone in the Penn General Casualty case (294 U. S. 189) just quoted.

A Court, whether state or federal, which first acquires potential control of property, whether by the mere filing of a bill to subject that property to the management or ultimate disposition of such Court, or by the entry of decrees impressing it with certain trusts which may ultimately require its disposition by such Court, acquires jurisdiction that is sole and exclusive so far as that property is concerned.

It is important in this connection to bear in mind that the Alimony Fund of $400,000.00 came into being by virtue of the decree of the Court of Common Pleas of Fayette County of March 5, 1915. Prior to that decree no fund existed. The only duty of the trustees so far as concerned the alimony payments to the petition-

er Lida was the collecting of the monies due her from Fayette Coke Company and paying them over to her. The decree itself created the fund.

Petitioners argue that their proceeding in the District Court is in personam and that they there seek judgment against Respondents.

However, the most that they can secure in the District Court would be a surcharge and the removal of the trustees. Such a surcharge would not be a judgment to pay money to them as in an ordinary personal action. The order could only be that the trustees make restitution either to themselves or to their successor trustees. Any recovery in their suit in the District Court would be by the trust fund and not by petitioners.

Mr. Justice Stern of the Supreme Court of Pennsylvania, in concluding his opinion, says:

> "The line of distinction between proceedings in personam and those in rem to determine whether or not the jurisdiction acquired by the court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a court has made or confirmed the appointment of trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process of investigation and adjudication by the first court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition.

> As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the federal court were contained in the account audited and confirmed by the county court in 1925 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different courts, but the same account could be audited simultaneously by two courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees."

It is true that the Supreme Court of Pennsylvania has decided on the one hand that the action is one in rem or quasi in rem, and that the District Court for the Western District of Pennsylvania has decided that the action is one in personam. If the refusal of a writ of certiorari to the Supreme Court of Pennsylvania by this Court will not make the decision of the Supreme Court of Pennsylvania the law of the case, then Respondents have no objection to the granting of the certiorari.

Petitioners Lida and John, Plaintiffs in the Bill and Amended Bill in the Federal Court, were parties plaintiff in the action in the State Court. They were suitors for the purpose of procuring a lien on specific property out of which the present trust funds have arisen.

They were parties in the action in the State Court when the lien was converted into a fixed sum to be realized and administered as directed by the decree of 1915 (151 a-154 a).

From that time they have regularly received and accepted the income to which, in virtue of that decree,

they are respectively entitled; they have claimed and enjoyed the benefits of that decree. Having come into the State Court, and it, at their instance, having created the fund, and having begun the administration thereof, it is not within their power or right to withdraw from the jurisdiction of the State Court that subject matter and to review the administration of that fund in any other tribunal. This results inevitably from the principles heretofore discussed.

In final analysis, what they are attempting is to call upon the trustees to account, at least in part, in a court other than the one whose jurisdiction they first invoked.

This cause was originally attempted to be removed to the United States Court (222 U. S. 555) in 1911 (6 a), and by one of these Petitioners in 1930 (10 a, 11 a), his petition being refused by the Court of Common Pleas of Fayette County, Pennsylvania, (10 a, 11 a).

(a) The Petitioners' Proceedings in the Federal Court which were enjoined by the State Court are not Candid.

Neither the Bill nor the Amended Bill in the District Court makes even indirect reference to the proceedings in the State Court in this cause. The original contract is set up, but that a lien to secure the payments to be made was established in virtue of the decree of the State Court is not mentioned.

Neither was it disclosed that Fitzgerald had made payment in full of all sums required by the original contract by him to be made and that a principal fund to yield an income, out of which the payments to Petitioner Lida were to be made had been created, and that this was all done in virtue of the decree of the

State Court. In like manner, it was not made to appear that an active trust to continue during the lifetime of Lida, requiring management and administration, had been established, and that the trust fund had been in the control and jurisdiction of the State Court since 1915.

There was no reference made to the fact that the trustees had filed two accounts in the Court of Common Pleas of Fayette County, Pennsylvania, one of which had been confirmed in 1925 and the other, which remained pending in that Court, subject to exceptions filed by another beneficiary for the benefit of all parties in interest, which two accounts included every investment challenged by the original Bill in the Federal Court and all investments challenged by the Amended Bill save one. As the Bill and the Amended Bill in the Federal Court were drawn, they of course did not on their face show that the State Court had sole and exclusive jurisdiction, and consequently, the motion to dismiss in the Federal Court did not lie.

Whether intended or not, the result is that Petitioners did not fairly disclose the facts on which the jurisdiction of the State Court had attached and which precluded the Federal Court from taking jurisdiction. In Harkin v. Brundage, 276 U. S. 36; 72, Law, Ed. 457, Chief Justice Taft said (465):

> "In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and the state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other."

Continuing, the Chief Justice said (466):

> "What was done here in delaying the state court and inducing the Federal court to act without a full disclosure of what had been done in the state court, was a fraud not only upon the state court but upon the Federal court itself, and when the Federal court learned the method by which its jurisdiction to appoint a receiver had been invoked, it should have denied to those who were guilty the further use of its jurisdiction until after the state court had been given an opportunity to exercise the jurisdiction which it was entitled to exercise, even to taking possession of the property."

The suit in the Federal Court was not in behalf of all of the beneficiaries—the remaindermen of the "Alimony Fund" is not made a party, and two of the beneficiaries of the "Children's Fund" are not parties.

A reading of the record discloses that the remainder of the "Alimony Fund" is held by the Second National Bank of Uniontown, in trust for certain purposes, and to join it would oust the jurisdiction of the Federal Court. Gerald Fitzgerald, Jr. has a one-sixth interest as life tenant in the "Children's Fund" and a one-third interest in the remainder of that fund. He is a citizen of Pennsylvania, and to join him would oust the jurisdiction of the Federal Court.

It is very obvious that the accounts of the trustees cannot be settled in the proceedings in the Federal Court for want of indispensible parties, and to join these parties would oust the jurisdiction of that Court.

Respectfully submitted,

DEAN D. STURGIS,
W. BROWN HIGBEE,
Counsel for Respondents.

APPENDIX.

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT.

JOSIAH V. THOMPSON, Trustee, *et al.*,

v.

GERALD PURCELL FITZGERALD, individually and as Trustee, *et al.*

Appeal of LIDA, PRINCESS OF THURN AND TAXIS (Hungary), and JOHN PURCELL FITZGERALD.

No. 172
March Term, 1937.
Appeal from Decree of Court of Common Pleas of Fayette County at No. 618 in Equity.
Reported
329 Pa. 497.

OPINION OF THE COURT.

STERN, *J.*:

In 1899 Lida Eleanor Niccols, a resident of Uniontown, was married to Gerald Purcell FitzGerald. Of the union were born three children, John, Edward and Gerald. In 1906 husband and wife instituted divorce proceedings against one another, and by agreement dated December 6, 1906, executed by them, Josiah V. Thompson and Charles E. Lenhart, and recorded in Fayette County, FitzGerald covenanted that after dissolution of the marriage he would pay to Thompson, Lenhart and himself, as trustees, (1) so much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company—partnerships operating in Fayette County and composed of FitzGerald and Lenhart—as would yield an annuity of $15,000 per annum for three years and thereafter $20,000 per annum, to be paid to his wife for life; (2) one-third of his share of the annual profits, to be in-

vested until there should accumulate the sum of $300,000, one-half of the income therefrom to be paid to his wife for life, and the other half either to accumulate or to be expended for the benefit of the children; or the trustees, in their discretion, might pay the entire income to his wife until the eldest child attained the age of twenty-one years; as each child became twenty-one he was to receive his share of the income as of right, and on the death of the wife and after the youngest child had attained the age of twenty-one the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children. The agreement provided that in the event of the death or resignation of any of the trustees the two remaining should appoint a successor, or on their failure to do so either of them, and also the wife, should have the right to petition the Court of Common Pleas of Fayette County to fill the vacancy. The wife agreed to relinquish all rights of dower and alimony, and there were provisions for the custody and control of the children.

The marriage was dissolved by Act of Parliament in 1907, and the stipulated payments were duly made until 1910. In that year a bill in equity was filed in the Fayette County court by Thompson as trustee, Mrs. FitzGerald, and the three children by their guardian ad litem, against FitzGerald and Lenhart as trustees, FitzGerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the court to remove FitzGerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust agreement and instruct the trustees accordingly, to

require FitzGerald and Lenhart, as members of the partnerships, to account for and pay into the trust, or to a sequestrator or receiver to be appointed by the court, the proper share of FitzGerald's profits and make such subsequent accountings as might be necessary during the term of the agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies. Answers were filed to the bill. That of FitzGerald asked, by way of counter relief, that the agreement of 1906 be declared null and void, that Thompson be ordered to account to the trust for moneys received by him and be removed from his office as trustee of the fund for the children. The suit culminated in 1911 in a decree which—affirmed on appeal to this court, 233 Pa. 242—ordered defendants to pay the amounts then remaining due under the agreement, adjudged the payments stipulated in the agreement to be a lien on FitzGerald's interest in the real estate owned by Fayette Coke Company, removed FitzGerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee, and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000 should have been accumulated in the fund for the children.

In place of FitzGerald, William M. Thompson was appointed a trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed in his stead. In that same year Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Fayette County court alleging that disputes had arisen between them and FitzGerald in regard to the proper construction of the agreement as to the profits of Fayette Coke Company, and that an

agreement had been reached whereby FitzGerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during a period of seven years, aggregating the sum of $400,000, these payments to be secured by a mortgage to the trustees on FitzGerald's undivided interest in the real estate of the Fayette Coke Company. The payments were to be invested by the trustees, and the net income, together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000, or such part thereof as had then accumulated, was to be returned to FitzGerald and the mortgage satisfied. The petition prayed the court to modify the decree of 1911 so as to permit this new agreement to become effective. Accordingly the court entered such a decree.

In 1918 the resignation of Josiah V. Thompson, and in 1919 that of Lenhart, was presented to the court and it was ordered that they be discharged from further accountings. Their places were supplied by G. S. Harah and Andrew A. Thompson, these appointments being approved and confirmed by the court. In 1925 the trustees, Harah, Andrew A. Thompson and Parshall, filed their first and partial account which was duly advertised and confirmed. On July 7, 1930, a second and partial account of the trust was filed, this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died. Robert J. Arnett was appointed to succeed Harah and his appointment was confirmed by the court.

The present controversy started with the filing of a bill in equity in the District Court of the United States for the Western District of Pennsylvania, on July 8,

1930, by Mrs. FitzGerald, who by remarriage had become Princess Lida of Thurn and Taxis and a citizen of Hungary, together with her eldest son John, then a citizen of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, the deceased former trustee, all citizens of Pennsylvania. The bill alleged that there was then in the wife's alimony fund upwards of $456,000, and in the children's fund upwards of $315,000, part of these sums including undistributed income, that among the investments in the alimony fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments of trust funds improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the trust estate, had failed to render proper accounts, and were not fit persons to act as trustees. The bill prayed that the trustees be required to file an account, that they be removed as trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties. After a motion to dismiss the bill was denied by the District Court, the trustees filed an answer alleging that the mortgages complained of were lawful investments, denying the allegations as to losses, mismanagement of the estate and a failure to render accounts, and declaring that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed in the Fayette County court in 1925, and that another account, filed July 7, 1930, was then awaiting confirmation in that court.

Nothing further was done in the equity proceeding in the federal court for several years. In April, 1937, the complainants there filed an amendment to their bill, specifying certain bonds and mortgages in the trust funds which they asserted were illegal investments, and alleging that the amount of the funds invested in mortgages on properties in Uniontown was too great. For the prayer of the original bill asking for the filing of an account there was substituted one that the trustees be required to restore to the funds "the moneys lost by their illegal and negligent conduct." To the amended bill the trustees filed an answer stating that practically all of the bonds and mortgages challenged by the complainants had been included in the account filed in the Fayette County court in 1925, or in that filed in 1930, or in both, that to the latter account exceptions had been filed and were pending in that Court, that, while losses had occurred in some of the investments, accretions on others more than compensated therefor, and that the criticisms made of the specified investments were not justified.

Meanwhile, on May 1, 1937, the trustees had filed a petition in the Fayette County Court setting forth that the prosecution of the suit in the Federal Court constituted an interference with the exclusive jurisdiction of the State Court, and praying for a decree restraining the Princess and her son John from further prosecution of that action. A rule to show cause why the restraining order should not issue was allowed. The Princess filed an answer alleging that the County Court never had control and possession of the trust funds, that there was no controversy there pending when the bill in equity was filed in the District Court, and that

the accounts filed by the trustees were ex parte proceedings, and denying that the State Court had exclusive jurisdiction over the subject-matter of the suit in the Federal Court. On June 29, 1937, the Fayette County Court made the trustees' rule absolute, and entered a decree enjoining the Princess and John Fitzgerald from prosecuting the equity suit in the Federal Court. The present appeal, taken on July 6, 1937, is by the Princess and her son from that decree of the Court below. At the same time John Fitzgerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County. After an answer was filed by the trustees, the District Court, on September 18, 1937, made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition. On July 19, 1937, the trustees had filed in the Fayette County Court a third and partial account of the two funds in the trust, to which exceptions were filed; testimony was also taken on the exceptions to the second account. The hearing fixed by the District Court was duly had, but no decision has thus far been rendered by that Court.

In *Peck v. Jenness*, 48 U. S. 612, 624, 625, it was said:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and * * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may re-

> tort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other."

The present case is a concrete embodiment of these apprehended possibilities. An impasse exists as the result of each of two courts enjoining parties litigant from proceeding in the other.

The Federal Court, having all the equity jurisdiction possessed by the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, undoubtedly could have entertained the bill filed by appellants had there been no antecedent proceedings in the State court. The present question is whether, in view of those proceedings, the Fayette County Court had obtained a jurisdiction over the subject-matter which precluded action in any other court.

It is firmly settled that a prior suit in a State or federal court which does not deal, either actually or potentially, with specific property or objects, and in which nothing more than a personal judgment is sought, not only does not prevent another suit from being brought for the same cause in the court of the other jurisdiction, but does not even furnish ground for a plea in abatement to the second action: *Stanton v. Embrey*, 93 U. S. 548; *Gordon v. Gilfoil*, 99 U. S. 168; *Kline v. Burke Construction Co.*, 260 U. S. 226; *Merritt v. American Steel-Barge Co.*, 79 Fed. 228, 232; *W. E. Stewart Land Co. v. Arthur*, 267 Fed. 184; *Holmes County, Miss. v. Burton Construction Co.*, 272 Fed. 565. In such a case the first Court in which suit was instituted is not ousted of its jurisdiction, nor delayed or obstructed in its exercise thereof, nor is there any resulting conflict of authority. If a judgment is rendered in the second action before the first is tried, it will

support a plea of res adjudicata in the first suit if the issue and the parties are the same.

In actions in rem the law is otherwise.

> "It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem*, the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction." *Kline v. Burke Construction Company*, 260 U. S. 226, 229.

In such cases, therefore, the rule is that the Court which first acquires jurisdiction of specific property by the possession thereof, or by the commencement of a suit from which it appears that it is necessary to a determination of the controversy, or to the enforcement of the prospective judgment or decree, for the court to have control and dominion over the property, thereby withdraws it from the jurisdiction of every other court so far as is necessary to accomplish the purpose of the suit, and the court is entitled to retain such control as is requisite to effectuate its final judgment or decree free from the interference of every other tribunal.

> "The *res* is as much withdrawn from the judicial power of the other [court] as if it had been carried physically into a different territorial sovereignty": *Covell v. Heyman*, 111 U. S. 176, 182.

The tribunal whose jurisdiction first attaches "holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted"; *Taylor v. Taintor*, 83 U. S. 366, 370.

In *Byers v. McAuley*, 149 U. S. 608, where a decedent estate was being administered in an orphans' Court, the United States Supreme Court reversed the decree of a Federal Circuit Court which directed the administrator of the estate to file an account and formulated a schedule of distribution. The Court said (pp. 612, 620):

> "It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate • • • The decree as a whole cannot be sustained, unless upon the theory that the Federal Court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum • • • Our conclusion • • • is that the Federal court erred in taking any action or making any decree looking to the mere administration of the estate • • • •"
>
> "The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other mesne or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired • • •. The possession of the res vests the the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons • • •. The doctrine in question is not limited in its appli-

cation to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* (Italics supplied), or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end without interference or hindrance on the part of any other court": *Merritt v. American Steel-Barge Co.*, 79 Fed. 228, 231.

In *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, it was held that where a Circuit Court of the United States had obtained jurisdiction of a bill to foreclose a corporate mortgage, a State Court could not thereafter entertain proceedings for the removal of the trustee under the mortgage, the appointment of a new trustee, and the enjoining of the foreclosure proceedings. The Supreme Court said (p. 61):

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being displaces other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."

And the court then proceeded with the same phraseology as in the opinion last quoted

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well

where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts*, (Italics supplied) or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts."

This same language was quoted in *Palmer v. State of Texas*, 212 U. S. 118, 129.

In *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, the doctrine of *Byers v. McAuley, supra*, was reaffirmed and applied, the Court saying (p. 45):

"In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, • • • for it is the result of the cases that in so far as the proper administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the Probate Court may not be interfered with."

Nor is it necessary, for the rule to apply, that the first Court must have actual possession of the res involved in the litigation. In *Amusement Syndicate Co. v. El Paso Land Improvement Co.*, 251 Fed. 345, suit was brought in a State Court to compel the removal of certain structures upon land. A temporary injunction was issued. It was held that the Federal Court could not thereafter entertain a petition involving the same subject-matter, the Court saying (p. 348):

"If these proceedings have not brought the specific property involved—the res—into the actual possession of the State Court, they have at least given that Court dominion and control over it. It is true that injunction acts only in personam; but it is also true that possession of specific property may be, and often is, effected by and through in-

junctive process. These considerations I think clearly distinguish this case from one strictly in personam, where only a personal judgment is in view, and brings it within the rule that as between two Courts of concurrent jurisdiction the one which gets the case first holds it to the exclusion of the other."

The res, priority of jurisdiction over which makes such jurisdiction exclusive, need not consist of specific property or anything tangible, but may be merely a status, such as marriage, or the probate of a will. The test, as already stated, is not possession of the property, but jurisdiction over the res; *Dennison Brick & Tile Co. v. Chicago Trust Co.*, 286 Fed. 818, 820. So in *Brown v. Pacific Mutual Life Ins. Co.*, 62 Fed. (2d) 711, it was held that where a suit was instituted in a Federal Court to obtain the rescission and cancellation of a policy of life insurance, a subsequent action in a State Court to recover on the policy was properly enjoined.

In *Penn General Casualty Co. v. Pennsylvania*, 294 U. S. 189, it was said (p. 195):

> "Where the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a State Court and a Federal Court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one Court which may be set up as *res adjudicata* in the other * * * But if the two suits are *in rem*, or *quasi* (italics supplied) *in rem*, requiring that the Court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one Court must of necessity yield to that of the other * * * The principal, applicable to both Federal and State Courts, is established that the Court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

Apparently the latest expression by the Supreme Court of the United States upon the principle here involved is that in the case of *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, where the Court said (p. 477):

> "In both these cases the proceedings in the State Court were *quasi in rem*. Control of the funds was essential to the exercise of the Court's jurisdiction to protect the rights of claimants * * *The principle, applicable to both Federal and State Courts, that the Court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, *administer trusts* (italics supplied), or liquidate estates, and in suits of a similar nature, where to give effect to its jurisdiction, the Court must control the property * * * If the two suits are *in rem* or *quasi in rem*, so that the Court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one Court must of necessity yield to that of the other * * * This principle is applied in the discharge of the long recognized duty of this Court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States.'"

It is true, as held in many cases,* that where the action brought in the Federal Court is merely to estab-

*Suydam v. Broadnax, 39 U. S. 67; Green's Administratrix v. Creighton, 64 U. S. 90; Yonley v. Lavender, 88 U. S. 276; Byers v. McAuley, 149 U. S. 608; Security Trust Co. v. Black River National Bank, 187 U. S. 211; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33; Richie v. Margolies, 279 U. S. 218; Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U. S. 613; General Baking Co. v. Harr, 300 U. S. 433; Harrison v. Moncravie, 264 Fed. 776; Commonwealth Trust Co. of Pittsburgh v. Atwood, 78 Fed. (2d) 92.

lish an interest or right to share in property being administered in a State Court, it may properly be prosecuted, since a judgment in such a suit would not disturb the control of the State Court over the fund or estate as to which it had taken jurisdiction. There is, however, a limitation that the exercise of such jurisdiction of the Federal Court does not include the power to draw to it the administration of the estate or to interfere in any way with its management or control.

> "Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution": *Commonwealth Trust Co. of Pittsburgh v. Bradford,* 297 U. S. 613, 619.

In the present case there is not involved any controversy as to the right of appellants to participate, or the extent of their interest, in the trust funds which, for more than twenty-seven years, have been administered under the direction and control of the Common Pleas Court of Fayette County. The relief sought by them in the Federal Court under their amended bill of complaint is to require the trustees to restore to the funds alleged to have been lost by their illegal and negligent management of the trust, to remove them as trustees, and to make all trustees under the deed of trust give bond with surety for the faithful performance of their duties. Such relief is concerned exclusively with the administration of the trust. It is, of course, true that the trust res is not in the possession of the Fayette County Court as would be property in a receivership, but it seems reasonably clear that the administration of a trust falls properly within the class of cases governed by the principle giving to the Court first assum-

ing jurisdiction in proceedings *quasi in rem* the exclusive right to determine questions of administration and management, as distinguished from the adjudication of individual rights and interests in the res. Not only do the authorities previously quoted specifically include *trust administration* in their statement of the rule, but, what is of chief importance, the reason underlying the rule applies forcibly to trust estates. In the present case the appointment of all the successive trustees was either made or confirmed by the State Court. One of their accounts has been confirmed by that Court, and two others have been filed and are there pending, exceptions having been taken to them. In exercising jurisdiction over a trust estate a Court may frequently be obliged to make orders concerning even the physical custody and safekeeping of specific items of the trust property, or authorizing or directing their sale and the making of reinvestments; one order of the Court below in the present case, under date of November 6, 1933, directed the trustees to deposit certain bonds under a corporate reorganization plan for conversion into new debentures. An accounting by fiduciaries is in itself a proceeding quasi in rem, in the sense that it not only adjudicates the legality of the investments constituting the trust, but also, if it results in a surcharge, orders payment and restoration of moneys to the trust fund, that is to the res. Such a surcharge is not a judgment to pay money to individuals as in an ordinary personal action. Thus if appellants were successful in the proceedings under their bill in equity no judgment would or could be rendered for payment to *them* of any money; there could be merely an order for restitution to the trustees themselves as continuing trustees or to their successor trustees; in other words,

the recovery would be by the trust fund and not by appellants, who can gain therefrom only upon distribution of the income and ultimately of the corpus of the trust, as prescribed in the agreement by which it was created.

The line of distinction between proceedings in personam and those in rem to determine whether or not the jurisdiction acquired by the Court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a Court has made or confirmed the appointment of trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another Court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process of investigation and adjudication by the first Court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition. As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the Federal Court were contained in the account audited and confirmed by the County Court in 1925 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different

Courts, but the same account could be audited simultaneously by two Courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees.

The order of the Court below making absolute the rule of the trustees to show cause why appellants should not be enjoined and restrained from prosecuting the suit in equity in the District Court of the United States for the Western District of Pennsylvania is affirmed; costs to be paid by appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 118

Between

JOSIAH V. THOMPSON, as Trustee for Lida Eleanor Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald of the trusts hereinafter described, Lida Eleanor Purcell Fitzgerald, John Purcell Fitzgerald, Edward Maurice Fitzgerald and Gerald Purcell Fitzgerald, infants, by William McClelland, their guardian *ad litem*,

Plaintiffs,

and

GERALD PURCELL FITZGERALD, individually and as Trustee of the trusts hereinafter described; CHARLES E. LENHART, as trustee of the trusts hereinafter described, GERALD PURCELL FITZGERALD and CHARLES E. LENHART, partners as Fayette Coke Company and Shamrock Supply Company, CHARLES E. LENHART, Manager of Fayette Coke Company and Shamrock Supply Company,

Defendants.

BRIEF FOR APPELLEES

W. W. PARSHALL (now deceased) and R. J. ARNETT, two of Trustees for Appellants and others and A. A. THOMPSON (now deceased) and JOHN S. HARAH, Administrator of G. S. HARAH, deceased, former Trustees for Appellants.

DEAN D. STURGIS,
59 East Main Street,
Uniontown, Penna.

and

W. BROWN HIGBEE,
Union Trust Building,
Uniontown, Penna.

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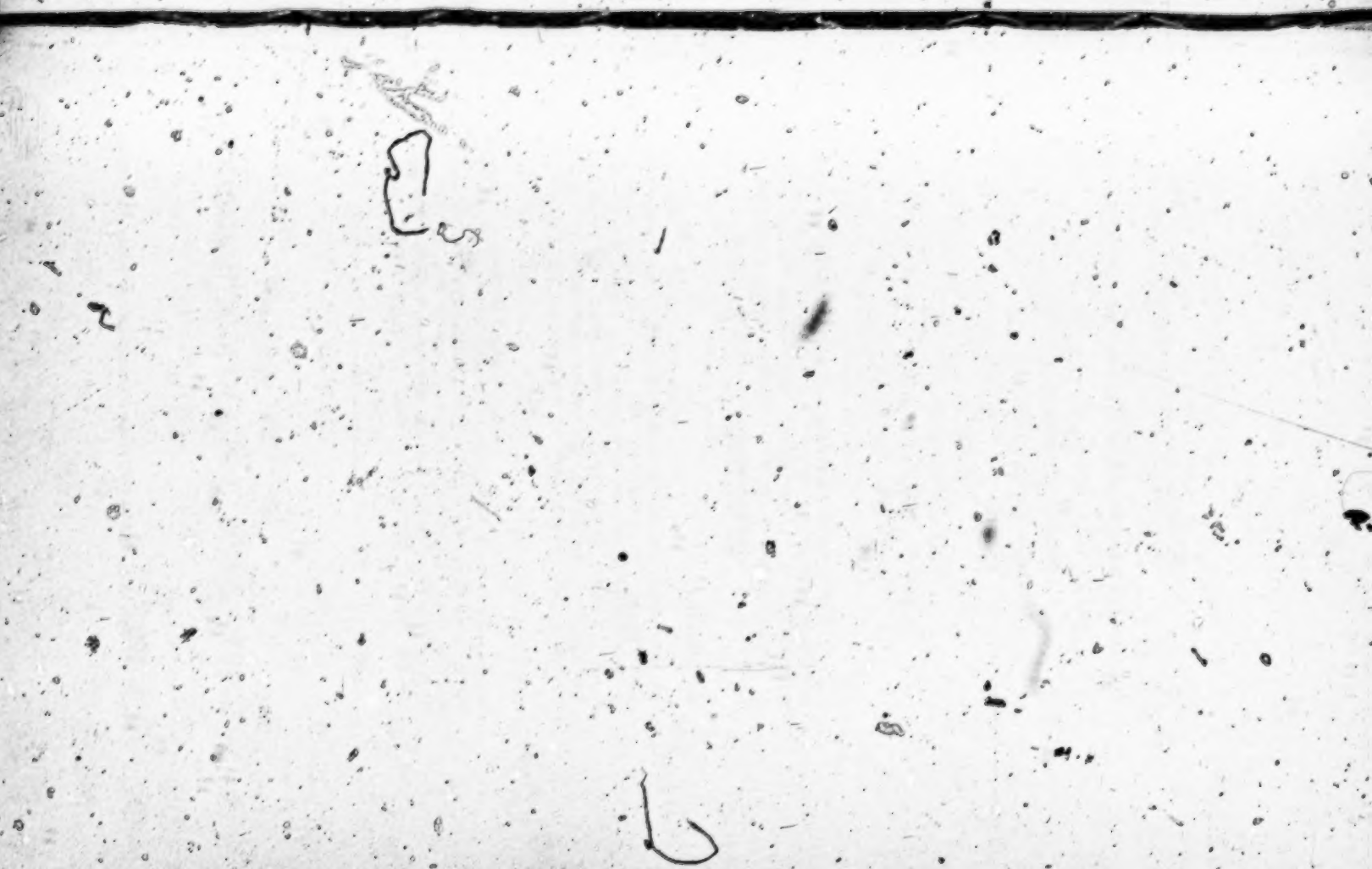

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STATEMENT OF THE CASE.

Appellant, LIDA, PRINCESS OF THURN AND TAXIS, in 1899 was married to Gerald Purcell Fitzgerald, a resident of the Isle of Waterford, in Ireland (11). In 1906 the husband and wife instituted divorce proceedings against one another and by agreement dated December 6, 1906 (12) executed by them, Josiah V. Thompson and Charles E. Lenhart, Fitzgerald covenanted that after dissolution of the marriage, he would pay to Thompson, Lenhart and himself as trustees

(1) So much of his share of the annual profits accruing from Fayette Coke Company and Shamrock Supply Company, partnerships operating in Fayette County, Pennsylvania, and composed of Fitzgerald and Lenhart, as would yield an annuity of $15,000.00 per annum for three years and thereafter $20,000.00 per annum to be paid to the wife for life (12);

(2) One-third of his share of the annual profits to be invested until there should accumulate the sum of $300,000.00, one-half of the income therefrom to be paid to the wife for life; the other half either to accumulate or to be expended for the benefit of the children; or the trustees in their discretion might pay the entire income to the wife until the eldest child attained the age of 21 years; as each child became 21 years, he was to receive his share of the income as of right, and on the death of the wife and after the youngest child attained the age of 21, the trustees were to distribute the remainder of the fund and all accumulations thereon among the surviving children (12, 13).

The agreement provided that in the event of the death or resignation of any of the trustees, the two re-

maining should appoint a successor, or on their failure to do so, either of them or the wife should have the right to petition the Court of Common Pleas of Fayette County, Pennsylvania, to fill the vacancy (14). The wife agreed to relinquish all rights of dower and alimony (14) and the agreement contained certain provisions for the custody and control of the children (15).

The marriage was dissolved by Act of Parliament in 1907 (28) and the stipulated payments were duly made until 1910 (59). In that year a Bill in Equity was filed in the Fayette County Court, hereinafter referred to interchangeably with the Supreme Court of Pennsylvania as the State Court, by Thompson as trustee (10), the wife and three children by their guardian *ad litem*, against Fitzgerald and Lenhart as trustees, Fitzgerald individually, and the Fayette Coke Company and Shamrock Supply Company, asking the Court to remove Fitzgerald and Lenhart as trustees, to declare and establish a lien upon the properties of the companies in order to secure the payment of the sums provided for in the agreement, to construe the trust Agreement and instruct the trustees accordingly, to require Fitzgerald and Lenhart, as members of the partnerships, to account for and pay into the Trust, or to a sequestrator or receiver to be appointed by the Court, the proper share of Fitzgerald's profits and make such subsequent accountings as might be necessary during the term of the Agreement, and to restrain defendants from alienating or encumbering any of the properties of the companies (31, 32). Answers were filed to the Bill. That of Fitzgerald asked by way of counter-relief that the

Agreement of 1906 be declared null and void, that Thompson be ordered to account to the Trust for monies received by him and that he be removed from his office as trustee of the fund for the children (41). The suit culminated in 1911 in a decree which—affirmed on appeal by the Supreme Court of Pennsylvania, 233 Pa. 242, writ of error dismissed, 222 U. S. 555—ordered defendants to pay amounts then remaining due under the Agreement, adjudged the payments stipulated in the Agreement to be a lien on Fitzgerald's interest in the real estate owned by Fayette Coke Company, removed Fitzgerald from his office as trustee, directed him to account for and pay over to the trust all sums in his hands held as trustee and restrained him from alienating or encumbering his interest in the property of the companies until the sum of $300,000.00 should have accumulated in the fund for the children (92-94).

In the place of Fitzgerald, William M. Thompson was appointed trustee by Thompson and Lenhart; he resigned in 1915 and William W. Parshall was appointed by the Court of Common Pleas of Fayette County in his stead (5). In the same year, Josiah V. Thompson, Lenhart and Parshall, the then trustees, filed a petition with the Court of Common Pleas of Fayette County, alleging that disputes had arisen between them and Fitzgerald with regard to a proper construction of the Agreement as to the profits of Fayette Coke Company (94-95), and that an agreement had been reached whereby Fitzgerald was to assign to the trustees his interest in the sinking fund of that company, and also to pay to them certain additional sums during the period of seven years aggre-

gating the sum of $400,000.00, these payments to be secured by a mortgage to the trustees on Fitzgerald's undivided interest in the real estate of the Fayette Coke Company. The payments were to be invested by the trustees and the net income together with the interest on the mortgage, was to be applied to the payment of the wife's annuity, and upon her death the $400,000.00, or such part thereof as had then accumulated, was to be returned to Fitzgerald, and the mortgage satisfied. The petition prayed the court to modify the decree of 1911 so as to permit the new agreement to become effective (98). Accordingly the court entered such a decree (99-101).

The fund of $400,000.00 was directed to be invested and reinvested by this decree, and the income realized therefrom used to pay to the wife the annuity of $20,000.00 in lieu of the arrangement under the agreement and former decree which simply required the trustees to collect from the Fayette Coke Company the sum of $20,000.00 annually and pay it over to the wife. The fund of $400,000.00 was completely paid into the hands of the trustees in 1925.

In 1918 the resignation of Josiah V. Thompson (5) and in 1919 that of Lenhart was presented to the state court and it was ordered that they be discharged from further accountings (6). Their places were supplied by G. S. Haran and Andrew A. Thompson, these appointments being approved and confirmed by that court (6).

In 1925 the trustees, Haran, Andrew A. Thompson and Parshall, filed their First and Partial Account in the state court which was duly advertised and confirmed (6). On July 7, 1930, a Second and Partial

Account of the Trust was filed (7), this time by Parshall and Andrew A. Thompson as surviving trustees, Harah having died on April 23, 1930, and Robert J. Arnett was appointed to succeed Harah and his appointment was confirmed by the Court.

The present controversy had its inception with the filing of a Bill in Equity in the District Court of the United States for the Western District of Pennsylvania, hereinafter referred to as the District or Federal Court, on July 8, 1930, by Princess Lida of Thurn and Taxis, the original plaintiff who had remarried, a citizen of Hungary, together with her eldest son John, then a citizen of the State of New York, against Andrew A. Thompson, Parshall and Arnett, trustees, and the administrators of the estate of G. S. Harah, all citizens of Pennsylvania (122).

The Bill alleged that there was in the wife's Alimony Fund upwards of $456,000.00 and in the Children's Fund upwards of $315,000.00, both of these sums including undistributed income, that among the investments in the Alimony Fund were certain mortgages on which interest and principal were long overdue and which were alleged to be unfit investments for trust funds, improperly made by the trustees, that there were other securities in the trust which had caused losses, and that the trustees were mismanaging the Trust Estate, had failed to render proper accounts, and were not fit persons to act as trustees (124-126). The Bill prayed that the trustees be required to file an account, that they be removed as trustees, and that all trustees under the deed of trust be required to give bond with surety for the faithful performance of their duties (126). A motion to dis-

miss this Bill was promptly filed. The motion alleged as a reason for dismissal the previous proceedings in the Court of Common Pleas of Fayette County and its sole and exclusive jurisdiction. As the motion was addressed to the Bill and no reference was therein made to the proceeding in the Court of Common Pleas of Fayette County, that fact could not be considered and the motion was overruled (135). Thereupon the trustees filed an Answer alleging that the mortgages complained of were lawful investments, denied the allegations as to losses, mismanagement of the estate and failure to render accounts and declared that itemized statements of the funds had been furnished annually to the Princess, that an account had been filed and confirmed by the Fayette County Court in 1925, and that another account had been filed July 7, 1930, the day before the Bill was filed in the District Court, which account was awaiting confirmation by the Fayette County Court (139-150).

Thereafter nothing was done with the equity proceedings in the federal court for several years. In April, 1937, the appellants here filed an amendment to the Bill in the federal court (151-154), specifying certain bonds and mortgages in the Trust Funds which they assert were illegal investments, alleging that the amount of the funds invested in mortgages was too great and for the prayer of the original Bill asking for the filing of an account, there was substituted one that the trustees be required to restore the funds, that is, the monies lost by their alleged illegal and negligent conduct. To the Amended Bill the trustees filed an answer (155-159), stating that all the bonds and mortgages challenged by the appellants had

been included in the account filed in the Fayette County Court in 1925, or in the one filed in 1930, and further alleging that to the account filed in 1930 exceptions had been filed which were pending in the Fayette County Court, and that while losses had occurred in some of the investments, accretions on others more than compensated therefor (155-159).

On May 1, 1937, the trustees filed a petition in the Fayette County Court setting forth that the prosecution of the suit in the federal court constituted an interference with the sole and exclusive jurisdiction of the state court, and prayed for a decree restraining the Princess and her son John from further prosecuting the federal action (104-106). A rule to show cause why the restraining order should not be issued was allowed (107). The Princess filed answer alleging that the Fayette County Court never had control and possession of the trust funds, and that there was no controversy there pending when the Bill in Equity was filed in the District Court, that the accounts filed by the trustees were *ex parte* proceedings, and denying that the state court had exclusive jurisdiction over the subject matter of the suit in the federal court (107-113).

On June 29, 1937, the state court made the trustees' rule absolute and entered the decree enjoining the Princess and her son John from prosecuting the equity suit in the federal court (113).

On July 6, 1937, the Princess and her son John appealed to the Supreme Court of Pennsylvania, which court affirmed the decision of the Fayette County Court (329 Pa. 497; 198 Atlantic 58).

On the same day John Fitzgerald filed a petition in the United States District Court to restrain the trustees from proceeding further in the Court of Common Pleas of Fayette County (160-162). An Answer was filed by the trustees (162), and the District Court on September 18th made an order fixing a hearing "on the jurisdictional issue" for November 8, 1937, and meanwhile enjoined the trustees as prayed in the petition (166). On July 19, 1937, the trustees filed in the Fayette County Court a Third and Partial Account of the two funds in trust to which exceptions were filed (9).

On the same date that the Supreme Court of Pennsylvania handed down an opinion affirming the action of the Fayette County Court, to-wit, March 21, 1938, the United States District Court for the Western District of Pennsylvania handed down an opinion (Appendix A, appellants' petition for certiorari) in which it held that the action of the state court was an action *in personam* and not an action *in rem* or quasi *in rem* as was held by the Supreme Court of Pennsylvania. No findings of fact or final decree has ever been entered by the District Court.

Since the petition for the writ of certiorari was filed in this court, W. W. Parshall and A. A. Thompson, two of the then respondents, have died.

On February 16, 1931, exceptions to the Second and Partial Account of the trustees were filed by Gerald Purcell Fitzgerald, a brother of John, and son of the Princess Lida, in behalf of himself and all other persons beneficially interested in the trusts (8).

Similar exceptions were filed by him, for himself and all others interested, to the Third and Partial Ac-

count on August 17, 1937 (9). These exceptions were not printed as a part of the record when the case was before the Supreme Court of Pennsylvania..

Although it does not appear from the printed record filed in this court, some testimony had been taken by the Court of Common Pleas of Fayette County at the time the appeal was taken to the Supreme Court of Pennsylvania, and is on file in this court by virtue of the writ of certiorari granted.

Since the appeal was taken to the Supreme Court of Pennsylvania, additional testimony has been taken and the record closed. This additional testimony is not incorporated in the record as certified by the Supreme Court of Pennsylvania.

The exceptions filed in the Court of Common Pleas by Gerald, above referred to, embrace every objection contained in the Amended Bill filed by these appellants in the District Court of the United States.

ARGUMENT.

I.

THE DOCTRINE OF SOLE AND EXCLUSIVE JURISDICTION.

1.

What the Principle Is.

As a general proposition, it is safe to predicate that when a court acquires jurisdiction of the subject matter of a cause, its right continues until the matter is finally and completely disposed of, and no court of coordinate authority is at liberty to interfere with its action.

The necessity out of which the doctrine arises, its purpose, extent, application, restrictions, and incidents may be most conveniently gathered from authoritative opinions in which it is stated, and to define its full scope, operation and character, a number of these will be here quoted at some length:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

Peck *et al.* v. Jenness *et al.*, 48 U. S. (7 Howard) 612 (624).

"The possession of the *res* vestes the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens

against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to Federal and State courts."

Farmers' Loan etc. Co. v. Lake St. Rd. Co., 177 U. S. 51 (61).

"The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute."

Harkin v. Brundage, 276 U. S. 36; 72 L. Ed. 457 (460).

"It is settled that where a Federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court. Where the action is *in rem*, the effect is to draw to the Federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true,—that where the jurisdiction of the state court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction."

Kline v. Burke Construction Co., 260 U. S. 226; 67 L. Ed. 226 (230).

"But if the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system (citing cases), and to protect the judicial processes of the court first assuming jurisdiction (citing cases), the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

Penn General Casualty Co. v. Penna., 294 U. S. 189; 79 L. Ed. 850 (855).

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over

the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union."

Wabash Railroad v. Adelbert College, 208 U. S. 38 (54); 52 L. Ed. 386.

"If the state court had acquired jurisdiction, over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty."

Palmer v. Texas, 212 U. S. 118 (125); 53 L. Ed. 435.

In continuing Justice Day, after quoting as appears herein from Farmers' Loan & Trust Co. v. Lake St. Elec. Ry. Co., said (129):

"If this rule is not applied, a court of competent jurisdiction, which by the law of its own pro-

cedure has acquired jurisdiction of property, may find itself, as in this case, after final judgment maintaining its right over the property, at the conclusion of the litigation deprived of the subject-matter of the suit. Indeed, this case would be an apt illustration of that situation. The courts of Texas have sustained the right to the receivership, and have held it was only suspended pending the appeal, but when it comes to enforcing the right to administer the property, if the Federal receivership is maintained the court of original jurisdiction finds itself stripped of the property and the same being administered in another court, which acquired its dominion over the property after it had become subject to the state jurisdiction."

In that case the Circuit Court of Appeals said:

"In cases where a state court and a United States court may each take jurisdiction, the one which first gets jurisdiction holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted. If jurisdiction as to the property attaches, it is exclusive till it has wrought its function. No other court of concurrent jurisdiction has the right to interfere with the property within the custody and control of the court first obtaining jurisdiction. Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. This principle is recognized in authorities too numerous for citation as one which is essential to the dignity and authority of every court, and essential also to the comity which should control the relations between courts of concurrent jurisdiction. A federal court, in a case where the possession of the thing in suit is necessary to the granting of the relief sought, after it has assumed jurisdiction, issued a subpoena in equity, caused it to be served, set the cause down for hearing, and made an order appointing a receiver, would not permit a state court to interfere with its jurisdiction over the property embraced by the order. The whole power of the

federal government, if necessary, would sustain the court in maintaining its exclusive jurisdiction. The United States courts should willingly give the same exclusive effect to proceedings in a state court of concurrent jurisdiction that they claim for such proceedings in federal courts. The rules on the subject must be reciprocal otherwise they will not produce that concord and harmony that is so essential to the effective and satisfactory enforcement of the law."

State of Texas v. Palmer, 158 Fed. 705 (709), affirmed in Palmer v. Texas, the case last cited.

The opinion of Judge Parker in a rather recent case, Wanamaker v. Eaves, 79 Fed. (2) 533 is a clear exposition of the subject, the force of which can only be appreciated by reading it as a whole.

Although perhaps immaterial for present purposes, this doctrine prevails in Pennsylvania, as appears in Doyle's Estate, 291 Pa. 263, and Nevin *et al.* v. Catanach, 264 Pa. 523.

This paves the way for a consideration of

2.

The Application Of This Principle.

(a)

The Import Of The Cited Cases.

At the risk of repetition, it may not be amiss to direct attention to the precise nature of this proceeding.

The cause was instituted by a Bill, the primary object of which was to charge specific property with a lien to secure the payment of certain sums out of the

profits of a mining property against which the lien was sought.

The lien was established by the original decree in this cause. No payment was to be made directly to any beneficiary. The lien could be realized upon and enforced only by trustees and only through the medium of the trustees could the beneficiaries receive payment.

This lien was a thing, an entity, or *res*. It was itself a trust fund held by the trustees for the use of the beneficiaries, but to be administered and enforced only by the trustees.

In 1915 the character of this lien was radically changed. It was transmuted into a mortgage to secure the payment of $700,000.00 less a certain sum already accumulated.

Thus a genuine trust fund was created consisting of the mortgage and the then accumulations. The accumulations were to be invested and re-invested by the trustees, and as the mortgage was from time to time paid, the proceeds were to be likewise invested and re-invested. The trust is to continue during the lifetime of Lida, one of the original plaintiffs. At her death it terminates. The principal of the alimony fund, $400,000.00, then becomes payable to Fitzgerald, who supplied the money, or his heirs or assigns. The $300,000.00 then becomes distributable to the children, John, Gerald and Edward.

All the promises to pay out of profits of the business as contemplated by the original contract have been eliminated, and for them has been substituted a specific fund to be kept invested by the trustees

during the continuance of the trust. It requires active administration. Out of the income realized from the investment of the principal, certain annual payments are to be made.

This is a trust-estate, pure and simple.

At the death of plaintiff Lida, the trust terminates and there must needs be a final settlement. The principal fund will then be transferred in kind to the beneficiaries or converted into money and the proceeds distributed, or it may be that part of it may be set over in kind and the remainder sold.

The trust fund having been created by the decree of the state court, it has sole and exclusive jurisdiction over it and of its administration until final settlement.

This is the doctrine of the cases cited, and it here applies in its full vigor because this trust fund is itself a *res*, entity or thing of which that court has potential control and constructive possession.

Matters of administration are questions arising in the course of this cause, and it was said in the Peck case, (48 U. S. 612) "that when a court has jurisdiction it has a right to decide every question which occurs in the cause".

In the Farmers' Loan case (177 U. S. 51) it is laid down that the rule is not restricted to cases where property has been actually seized, "but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates".

Here the suit was brought to establish a lien, and in its present status is the administration of a trust.

In that case it is further said that the rule applies to cases where "the court may be compelled to assume the possession and control of the property to be affected".

Here the court may be compelled, in order finally to settle this trust, to direct the sale of the trust property in whole or in part.

Actual physical possession is not necessary. In the Harkin case (276 U. S. 36) it is predicated that "the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so".

The state court has control of the property in question, for as is said in the Adelbert College case (208 U. S. 38), the court which first acquires control of property has "jurisdiction to hear and determine all questions respecting the control of the property", which precludes the jurisdiction of any court of coordinate authority.

In the Burke case (260 U. S. 226) it is declared that the effect of the doctrine is to "draw to the Federal court (*mutatus mutandi* to the state court) possession or control, actual or potential, of the *res* and the exercise by the state court of jurisdiction over the same *res* necessarily impairs and may defeat the jurisdiction of the federal court".

The action here is clearly *in rem*, and possession and control of the trust property is potentially in the state court. Because there is a *res*, this action is certainly not personal, and whether it be strictly *in rem*

or only *quasi in rem* makes no difference, for as said by Justice Stone in the Penn Casualty case (294 U. S. 189) "if the two suits are *in rem* or *quasi in rem* * * * the jurisdiction in one court must of necessity yield to that of the other".

A court, whether state or federal, which first acquires potential control of property, whether by the mere filing of a bill to subject that property to the management or ultimate disposition of such court, or by the entry of decrees impressing it with certain trusts which may ultimately require its disposition by such court, acquires jurisdiction that is sole and exclusive so far as that property is concerned.

This is equally true whether the court first acquiring jurisdiction is state or federal.

It is clearly so declared in the Palmer case (212 U. S. 118), in which Justice Day said:

> "If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well settled principles, often recognized and enforced in this court, there should be no interference with the action of the state court while thus exercising its authorized jurisdiction."

This doctrine does not mean that federal courts are superior to state courts, or vice versa. As was said by Justice Moody in the Adelbert College case (208 U. S. 38):

> "Those principles (the exclusive jurisdiction of the court first acquiring control), * * * are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice."

The state court first acquired jurisdiction of the subject matter, that is, certain property and its administration by the trustees. Thereby it acquired jurisdiction of all questions arising out of the management and administration of the property. If what has been done in the state court has been enacted in the federal court, it is beyond question that for the Court of Common Pleas to entertain a bill similar to that filed by Lida and John in the District Court would be unseemly and subversive of justice.

That the first action was in the state court does not differentiate that consequence. Palmer v. Texas, *supra*. The state court having acquired jurisdiction, the District Court has no superior right and for it to entertain the bill filed by Lida and John is just as unseemly and subversive of justice as if the original proceeding had been in the federal tribunal and the Bill, the prosecution of which is here sought to be restrained, had been filed in the state court.

The state court has at least constructive possession of this trust fund and the trustees *in propria vigore* are officers of this court.

> "An administrator appointed by a state court is an officer of that court, his possession of the decedent's property is a possession taken in obedience to the orders of that court, it is the possession of the court."
>
> Yonley v. Lavender, 21 Wallace 276.

Apparently the latest expression by this court upon the principle here involved is that in the case of

> United States v. Bank of New York & Trust Co., 296 U. S. 463,

where the court said (p. 477):

"In both these cases the proceedings in the State Court were *quasi in rem*. Control of the funds was essential to the exercise of the Court's jurisdiction to protect the rights of claimants * * *. The principle, applicable to both Federal and State Courts, that the Court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, *administer trusts* (italics supplied), or liquidate estates, and in suits of a similar nature, where to give effect to its jurisdiction, the Court must control the property * * *. If the two suits are *in rem* or *quasi in rem*, so that the Court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one Court must of necessity yield to that of the other * * *. This principle is applied in the discharge of the long recognized duty of this Court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States.'"

In

Byers v. McAuley, 149 U. S. 608,

where a decedent's estate was being administered in an Orphans' Court, this court reversed the decree of a federal circuit court which directed the administrator of the estate to file an account and formulated a schedule of distribution, and said (pp. 612, 629):

"It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate * * *. The decree as a whole cannot be sustained, unless upon the theory that the Fed-

eral Court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum * * *. Our conclusion * * * is that the Federal Court erred in taking any action or making any decree looking to the mere administration of the estate * * *."

"The doctrine is well settled that when a court, in the progress of a suit properly pending before it, takes possession of property, either under a writ of replevin or attachment, or by other *mesne* or final process, or by the appointment of a receiver or assignee, its jurisdiction over the property for the time being becomes exclusive, and no other court can lawfully interfere with the possession so acquired * * *. The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons * * *. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* (italics supplied), or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end without interference or hindrance on the part of any other court." Merritt v. American Steel-Barge Co., 79 Fed. 228, 231.

The right of a court to issue an injunction directed to a suitor and not to any court upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, was expressly sustained by this court in

Steelman v. All Continent Corporation, 301 U. S. 278,

in which Mr. Justice Cardozo says (292):

> "We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases."

(b).

A Distinction Of Importance.

In the light of the record here, and by force of the principles declared in the cases cited, it cannot be disputed that the state court has constructive possession and potential control of the fund in question, and that in virtue of these facts, its jurisdiction is sole and exclusive.

However, this does not necessarily preclude a federal court from exercising a limited authority for specific purposes where it would otherwise have jurisdiction. This jurisdiction, however, does not comprehend any interference with the fund or its control and management, but is strictly confined to the ascertainment of the rights of complaining persons to share in its distribution, either as creditors or beneficiaries.

It springs out of the consideration that the jurisdiction of a federal court in equity is derived from the Constitution which vests such courts with the authority of that of the High Court of Chancery in England, but

this in no way conflicts with the rule of sole and exclusive jurisdiction where possession or control, whether actual or potential, of property has been acquired by a state court. In such cases a federal court may give relief consonant with the principles of equity, but may not control, supervise or annul the proceedings of the state courts.

The case is completely analogous to a testamentary trust created by a will probated in an appropriate court. In such case, the federal court may, where it otherwise has jurisdiction, determine the interest of a party in the fund, and while the state court must respect that finding, it still retains exclusive jurisdiction to administer and distribute the fund.

There are many cases dealing with this branch of federal jurisdiction and it is not possible to discuss all of them. They uniformly recognize and emphasize this distinction and reference to two illustrative ones will suffice for present purposes.

A leading case is

Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33.

In that case plaintiff filed a bill, which, had all her prayers been granted, would have taken a fund out of the control of the probate court, but she also prayed to have her interest in the fund established. The lower court dismissed the bill for want of jurisdiction, but this court held that while much that was prayed for could not be granted, the federal court had jurisdiction to decide what her interest in the fund was, and therefore re-instated the bill to determine that particular question.

Mr. Justice Day, delivering the opinion, said (43):

"From an early period in the history of this court cases have arisen requiring a consideration and determination of the jurisdiction of the courts of the United States to entertain suits against administrators and executors for the purpose of establishing claims against estates, and to have a determination of the rights of persons claiming an interest therein. And this court has had occasion to consider how far the jurisdiction in equity of the courts of the United States in such matters may be affected by the statutes of the States providing for courts of probate for the establishment of wills and the settlement of estates. We will not stop to analyze or review in detail all these cases, as they have been the subject of frequent and recent consideration in this court. The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different states arise which are within the established equity jurisdiction of the Federal Courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal Courts of Chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them."

The phrase to "have a proper execution of the trust as to them" means that the state court shall give full effect to the federal decree in so far as it defines the rights of the parties, and that the trust shall be executed by the state court on the basis of the decree of

the federal court. It has no reference to the management or administration of the fund.

Justice Day continues (43-44):

"The rule stated in many cases in this court affirms the jurisdiction of the Federal Courts to give relief of the nature stated, notwithstanding the statutes of the State undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates. This rule is subject to certain qualifications, which we may now notice. The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court."

Again he says (45):

"In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with. It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court cannot be interfered with by the decree of the Federal Court. Still, we think there is an aspect of this case within the Federal jurisdiction, and for which relief may be granted to the complainant, if she makes out the allegations of her bill under the other prayers, and the prayer for general relief therein contained. Under such prayer a court of equity will shape its decree according to the equity of the case."

The learned justice continues (46):

> "The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the Court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill."

By way of conclusion it is said (50):

> "Upon the whole case we are of opinion that the Federal Court has jurisdiction for the purpose of ascertaining the rights of the complainant to recover as against the executor, and the interest of the persons before the court in the fund. While the court could make no decree which would interfere with the possession of the probate court, it had jurisdiction to entertain the bill and to render a judgment binding upon the parties to the extent and in the manner which we have already stated."

A casual inspection of the bill and amendment filed in the Federal Court shows that no controversy concerning a share or interest in the fund is raised. That was all settled by the former proceedings in the state court. The matter involved is the conduct of the trustees in the administration of the fund and is excluded from Federal jurisdiction by the very words of Justice Day:

> "The Bill in this case goes too far in asking to have an accounting of the estate such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts and the settlement of the accounts by the executor or

administrator the jurisdiction of the probate court may not be interfered with."

Here the only questions raised in the federal court are exclusively matters of accounting, of which the state court has exclusive jurisdiction.

Another strikingly illustrative case is

Commonwealth Trust Co. v. Atwood, 78 Fed. (2) 92.

Bank of Pittsburgh National Association established a mortgage pool, of which the Orphans' Court of Allegheny County, after the insolvency of the Bank, appointed Commonwealth Trust Company successor-trustee. The Bank of Pittsburgh had advanced certain moneys to the pool for the payment of interest and held a number of the participating certificates. The Orphans' Court in making distribution did not award anything to the receiver of the Bank either on account of the money advanced or certificates held by it.

The receiver then filed his Bill in the United States District Court and that court found that the Bank had advanced $40,213.58 which it allowed as a claim to be paid in full out of the pool and directed the trustee to pay. It further found that the Bank had a participating interest of $291,020.45 and directed the trustee to pay on account thereof a dividend corresponding with that already paid on like claims.

The question of the jurisdiction was raised on appeal and Judge Woolley said (94):

"It is certain that, so far as the *res* of the estate now being administered by the Orphans' Court are concerned, the jurisdiction of that court

is exclusive. A federal court cannot reach into the state court and take the *res* or enforce a right to specific property in possession of its receiver or trustee, except upon application to the court which appointed him. Riehle v. Margolies, 279 U. S. 218, 49 S. Ct. 310, 73 L. Ed. 669; Harrison v. Moncravie (C. C. A.), 264 F. 776, 779. It is likewise certain that a federal district court, on jurisdiction otherwise shown, as diversity of citizenship or, as in this case, liquidation of a national bank, may establish 'a claim constituting the basis of a right to participate in the distribution of property in the possession of' another court. The judgment of the federal court does not in such case purport to deal with property. Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536. It deals solely with the existence and amount of a claim, Riehle v. Margolies, *supra;* Harrison v. Moncravie, *supra,* which when established by decree takes its 'share of the estate as administered by the probate court.'"

However, the directions of the trustee to pay made by the court below were set aside and the opinion states (95):

"We approve the conclusions of law made by the learned trial court on the stipulated facts establishing the several claims of the bank to proceeds of the mortgage pool in liquidation, but are constrained to differ in respect to its orders addressed directly to the trustee appointed by the Orphans' Court to pay certain of them forthwith. As these orders, in practical effect, reach into the estate and grasp the *res,* against which there may, for ought we know, be claims of higher rank or with priorities, and concerning which certainly the Orphans' Court, first to acquire jurisdiction, is alone authorized under the cited authorities to make distribution and pay the claims here finally adjudged, it becomes necessary that the learned District Court modify the first and third paragraphs of its decree; the first paragraph by with-

drawing its mandate to the trustee, an officer of the Orphans' Court, to pay the bank's claim there established, and the third paragraph by withdrawing a like mandate to the trustee to pay the bank's claims there established, and by giving the claims established in paragraphs 1 and 3 priority of payments over any future distribution of assets to participants in the pool."

On appeal to this court, Commonwealth Trust Co. vs. Bradford, 297 U. S. 613, 80 L. Ed. 920, the distinction here made is well stated by Mr. Justice MacReynolds (924):

> "The original bill revealed that the Receiver had been denied participation as a *cestui que* trust in the assets held by petitioner Trust Company, and asked an adjudication of his rights therein. He did not seek direct interference with possession or control of the assets; he prayed that his right to partake thereof be determined."

Quite obviously the Bill and Amended Bill of Lida and John does not ask for any relief within the jurisdiction of the federal court, and is addressed exclusively to what is in effect an accounting, of which the state court has sole and exclusive jurisdiction.

Brief mention should perhaps be made of

Payne v. Hook, 74 U. S. 425.

Taken literally, the opinion seems to indicate that given the requisite diversity of citizenship or other ground of federal jurisdiction, there is no case that may not be brought within the realm of federal jurisdiction.

It has been so explained, modified, and applied that it is not now deemed to conflict with the doctrine declared in Waterman v. Canal-La. Bank, *supra*, already quoted, in which the prevailing principle is announced.

After a final decree was entered in that case, there was another appeal,

Hook v. Payne, 81 U. S. 252,

and much of the former opinion, if not in terms reversed, was largely departed from.

In

Levi v. Columbia Life Insurance, 1 Fed. 206,

it was said (211):

"Whether Payne v. Hook is authority for anything is a question",

and some poignant, but none the less apt, criticism is made.

The opinion in

Yonley v. Lavender, 88 U. S. 276,

enunciated what is the now accepted principle antithetic to what was first said in Payne v. Hook. There is an earnest endeavor at reconciliation that does not very well succeed.

Directly opposite to what was said in the Payne-Hook case is what was decided in Byers v. McAuley, 149 U. S. 608. Here again there is an ineffectual effort to distinguish and reconcile.

The ruling, however, is in perfect harmony with the principles declared by Mr. Justice Day in the Waterman case.

Another case cited by Justice Day exemplifying the modern conception is

Farrell v. O'Brien, 199 U. S. 89.

The opinion of Justice White in that case, to which there will be later allusion, is conclusive that federal jurisdiction in the class of cases to which that at bar

belongs, is strictly limited and not of the broad and expansive character the opinion in Payne v. Hook might seem to indicate.

It should be observed that in Payne v. Hook there was an allegation of fraud, which is a favorite subject of a court in equity, and the real ground of decision is that the equity jurisdiction of the federal court attached because there was a fraud. This is the basis of the distinctions made in later comments concerning it, to which there has been reference.

Nothing said or decided in Payne v. Hook affords a semblance of reason for denying to appellees the relief here sought.

3.

Some Particular Features.

Under the authority of the cases cited, there should be no difficulty in reaching the conclusion that the state court has sole and exclusive jurisdiction of the instant trust fund and of the trustees who are administering it, and that this inhibits any other court of concurrent jurisdiction from entertaining any suit having to do with that trust fund as a *res* or thing. This amply warrants the relief sought by the trustees.

However, there are certain peculiar facts rendering the enforcement of the doctrine imperative. The present purpose is to point them out as succinctly as possible.

(a)

Lida and John Are Parties.

Lida and John, plaintiffs in the Bill filed in the federal court, are parties plaintiff in this action in

the state court. They were suitors for the purpose of procuring a lien on specific property out of which the present fund has arisen.

They were parties in this action when the lien was converted into a fixed sum to be realized and administered as directed by the decree of 1915.

From that time they have regularly received and accepted the income to which, in virtue of that decree, they are respectively entitled; they have claimed and enjoyed the benefits of that decree. Having come into that court, and it, at their instance, having created the fund, and having begun the administration thereof, it is not within their power or right to withdraw from the jurisdiction of the court that subject matter and to review the administration of that fund in any other tribunal.

This results inevitably from the principle already demonstrated.

In final analysis, what they are attempting is to call upon the trustees to account, at least in part, in a court other than the one whose jurisdiction they first invoked.

There is no doubt of the right and duty of a court to discipline a contumacious party. Lida and John are interfering with the trust fund in the potential custody of the state court by attempting to litigate questions arising out of the administration thereof in another tribunal. This conduct is a defiance of the authority of the state court and an insult to its dignity.

There is ample authority to hold this conduct a contempt, and the duty of the state court to restrain it is obvious.

Plaintiffs in the federal court seek to have the trustees adjudged negligent, to surcharge them for losses alleged to have occurred on certain investments, and to remove them or require them to give bond.

If the suit in the federal court be maintained and it adjudge and determine of and concerning these things which are incidents and part and parcel of the administration of the trust fund in the custody of the state court, to that extent the administration of the trust fund is taken out of the control of the state court.

The determination of the federal court will render nugatory anything that the state court may decree in connection with such of the acts of the trustees as are brought within federal cognizance, and this may be all, as well as only part.

The opinion of Chief Justice Tanney, sitting at circuit, in

Wartman v. Wartman, 29 Fed. 303,

is an illuminating authority. He there said:

"Disobedience to and defiance of the legitimate authority of the court is contempt."

Whenever an act is done in respect of the subject matter of litigation which may render nugatory the decree of a court, there is a contempt, and that even in the absence of any intent, Wartman v. Wartman, *supra*.

The following from the opinion of Justice Kephart in

State Grand Lodge of Pa. v. Morrison, 277 Pa. 41,

here applies with crushing force (47):

"To set at naught decrees of a court without injury resulting therefrom might, in exceptional

> cases, be condoned, but to set at defiance those decrees where property and individual rights are solemnly finally adjudicated, and to raise impediments to frustrate the execution of these decrees, is without a semblance of justification. If any court permits such contempts to go unpunished, it might as well close its doors, proclaim itself incapable of functioning, and become itself contemptible. We have not at all reached this stage; the court below is not without power to vindicate its own decrees and to punish for disobedience."

There can be no question that the effect of the action in the federal court is "to raise impediments to frustrate" the exercise by the state court of the jurisdiction which it has acquired of the subject matter here involved.

As was said in the opinion, that court "is not without power to vindicate its own" jurisdiction.

(b)

Lida And John Have No Right Of Action In The Federal Court.

An inspection of the Bill and Amendment filed in the District Court discloses that the complaint is the misconduct of the trustees as trustees.

It alleges that they have been grossly negligent; that they have made certain investments on which there will be losses; and that they are continuing to make improper investments.

It is too elementary to admit of discussion that these charges are against the trustees in the discharge of their official duties, and that the Bill brings under review their management of the trust fund.

As trustees they are charged with the duty of accounting for their management and stewardship and a proceeding of that character is the only one by which their personal liability may be determined.

Their management of the affairs of this trust is preeminently within the sole and exclusive jurisdiction of the state court, and an examination of the record shows that they filed an account in 1925, which has been confirmed. It includes a great many of the investments brought in question by the Bill.

The record further shows that they filed an account in 1930, to which certain exceptions are pending. It includes a number of the investments challenged by the Bill, and these two accounts in combination include all the criticised investments except one.

A petition was presented to remove the second of these accounts to the District Court, which was denied. In the opinion it was said:

> "The account shows payment into each of these funds, and these funds in effect being created by the court, they still are in the custody of the court."

The state court then actually has for adjudication two accounts including all the items specifically mentioned in the Bill, with a single exception.

The suit in the federal court is not in behalf of all the beneficiaries—the remainderman of the Alimony Fund is not made a part , and one of the beneficiaries of the Children's Fund is not a party. The plaintiffs in that Bill are the life tenant of the Alimony Fund and a life tenant of the Children's Fund, having a one-sixth interest, and as a remainderman in that fund, a one-third interest.

The remainder of the Alimony Fund is held by the Second National Bank of Uniontown in trust for certain purposes, and to join it would oust the jurisdiction of the court. Gerald, Jr. has a one-sixth interest as life tenant in the Children's fund and a one-third interest in the remainder of that fund. He is a citizen of Pennsylvania, and to join him would oust the jurisdiction.

It is very obvious that the accounts of the trustees cannot be settled in that proceeding for want of indispensable parties, and to join those parties would oust the jurisdiction of the court.

The suit in the federal court is not in behalf of the trust fund as against the trustees, but is personally by Lida and John apparently in their own right.

Most certainly they cannot recover a judgment against the trustees for the benefit of themselves and require the trustees to make payment to them for anything done in the administration of the estate.

If the trustees have so managed the fund as to render themselves personally liable for a resulting loss, that loss as such does not belong to Lida and John, even in fractional interest and shares, but to the corpus of the trust estate itself. The liability of the trustees to make good losses demands and requires restoration of the losses, either to themselves as continuing trustees, or to successor-trustees.

Lida and John have no right to receive anything out of the trust fund except on distributions made by the trustees; they can obtain nothing except through the medium of the trustees.

If, for illustration, the trustees had defaulted in a given sum, that default is property of the trust, and making good the default simply restores to the fund what has been taken from it. Exactly the same result follows where there has been a loss through negligence or illegal investment. It must be restored to make good the fund.

Plaintiffs in the federal court can obtain no relief that cannot be procured by an accounting in the state court. In fact, the orderly method to ascertain the liability of the trustees, if any, is by an accounting.

What the Bill in the District Court actually seeks is a partial accounting. Were a complete accounting sought, it could not be maintained. Where one court has jurisdiction of a trust fund, another court of concurrent jurisdiction cannot entertain a proceeding to account. Thus, where a trust fund is involved in any equity proceeding in the Common Pleas of Pennsylvania, the Orphans' Court cannot accept and audit an account. If it could "the varient decrees of the different courts would lead to confusion and injustice.", Breyer's Estate, 19 D. & C. 255.

However, as is decided in the Waterman v. Canal-La. Bank case (215 U. S. 33), which has been already considered in detail, an accounting cannot be had in the federal court.

In order that such court may have jurisdiction the suit must be an independent one *inter partes*, and not ancillary or auxiliary. This is predicated by Justice White in

Farrell v. O'Brien, 199 U. S. 89.

That proceeding was in a federal court, and the object was to set aside the probate of a will. If a state has a statutory system by which an appeal from the probate of a will may be taken or the right is given by custom, then the appeal is only ancillary, a mere continuance of the probate proceeding, and the jurisdiction of the state court is exclusive, so that a federal court may not take cognizance of a suit for that purpose. (This is the converse of Payne v. Hook, *supra.*)

On the other hand, if the state does not by statute or custom have such a system, but the will may be attacked in equity in an independent suit, a federal court, if the required jurisdictional facts exist, may entertain such an action.

In the case cited Justice White (later Chief Justice) said (110):

> "The cited authorities establish that the words referred to must relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding, that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect. We say the words action or suit *inter partes* must have this significance, because unless that be their import it would follow that a State may not allow any question to be raised concerning the right to probate at the time of the application, or any such question thereafter to be made in an ancillary probate proceeding without depriving itself of its concededly exclusive authority over the probate of wills."

This idea is even more fully developed in the same case in the Circuit Court of Appeals.

Carrau v. O'Calligan, 125 Fed. 657,

the first syllabus of which is (657):

> "Federal Courts—Equity Jurisdiction—Setting Aside Probate of Will. A federal court of equity is without jurisdiction of a suit to set aside the probate of a will, unless by the law of the state a suit in equity for the purpose may be maintained in a state court, in which case a similar suit may be maintained in a federal court. Where the requisite diversity of citizenship and other jurisdictional facts exist."

Applying this principle to the suit in the District Court, it is evident that the action is not an independent suit *inter partes*, but is only ancillary or auxiliary.

An independent suit *inter partes* is one in which the actors may obtain directly personal relief of some sort. It might be the establishment of a claim, as in Commonwealth Trust Co., *supra*. Conceivably, there might be cases where money would be ordered to be paid or other direct relief awarded.

Nothing sought in the suit here involved is referable to these categories. The things sought are solely incidental to the administration of the trust fund—they are therefore only ancillary.

The time for distribution has not arrived. The fund is, as it were, a going concern and the matters sought to be litigated involve only administration and management. These do not relate to substantial rights, and although important, are only incidental, auxiliary and ancillary. A suit addressed to them is not an independent one *inter partes* as those terms are used in federal jurisprudence.

If the trust here involved had been created by a will, the exclusive jurisdiction of the Orphans' Court of the county in which it was probated would be beyond doubt. The jurisdiction of the state court rests on just as firm a foundation.

The fund arose out of a contract. John and Lida, with the other beneficiaries, invoked the jurisdiction of the Court of Common Pleas of Fayette County to enforce that contract and execute the trusts it created.

Responsive to their prayer, the state court entered its decree enforcing the contract and for more than twenty-five years has been engaged in supervising the administration of the trust.

Having invoked the jurisdiction of that court, John and Lida cannot rush into some other court to litigate the disputes arising out of and incidental to the execution of this trust.

A party may not be in court and out of court at will.

(c)

The Proceeding In the Federal Court is not Candid.

Neither the Bill nor the Amendment makes even indirect reference to the proceedings in this cause. The original contract is set up, but that a lien to secure the payments to be made was established in virtue of the decree of the state court is not mentioned.

Neither is it disclosed that Fitzgerald has made payment in full of all sums required by the original contract by him to be made and that a principal fund to yield an income, out of which the payments to Lida are to be made has been created, and that this was all done in virtue of the decrees of that court. In like

manner, it is not made to appear that an active trust to continue during the lifetime of Lida, requiring management and administration, has been established, and that this trust fund has been in the control and jurisdiction of the state court since 1915.

There is no reference to the fact, as disclosed by the record here, that the trustees have filed three accounts, one of which has been confirmed and the other two of which remain pending subject to exceptions, which three accounts include every investment challenged by the original bill, and all the investments challenged by the amendment, save one.

If these facts had been fairly and candidly stated a motion to dismiss the bill for want of jurisdiction would lie. In that situation the bill would disclose that the state court had sole and exclusive jurisdiction, which precludes interference by the federal court with that subject matter. However, as the Bill was drawn, that infirmity did not appear on its face, and a motion to dismiss would not lie.

As the record stands, the proceedings in the state court can be brought in only by answer and proof, and unless the prosecution of that suit be restrained, as here sought, there will needs be a plenary trial in the federal court before the question of jurisdiction can be raised and determined.

Whether intended or not, the result is that plaintiff has not fairly disclosed the facts on which the precedent jurisdiction had attached, and which preclude the federal court from taking jurisdiction.

In the Brundage case, (72 Law Ed. 457) Chief Justice Taft said (465):

"In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and the state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forbearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other."

Continuing, the Chief Justice said (466):

"What was done here in delaying the state court and inducing the Federal court to act without a full disclosure of what had been done in the state court, was a fraud not only upon the state court but upon the Federal court itself, and when the Federal court learned the method by which its jurisdiction to appoint a receiver had been invoked, it should have denied to those who were guilty the further use of its jurisdiction until after the state court had been given an opportunity to exercise the jurisdiction which it was entitled to exercise, even to taking possession of the property."

In that case a stockholder of a corporation filed a creditor's bill in a state court for the appointment of a receiver. On the date fixed for a hearing on the motion to appoint, an attorney representing the defendant appeared and requested a postponement for a few days, which was granted. During the *hiatus* the defendant procured a creditor to file a bill in the federal court, to which it filed an answer, admitting the allegations of the bill. A motion for the appointment of a receiver was then made, and the defendant consenting, was allowed. No notice of this proceeding was given the plaintiff in the bill in the state court.

This court held that the use of the period of delay, procured as stated, for this purpose, and the failure

to advise the federal court of the pendency of the case in the state court, especially of the latter, were a fraud on both the state and federal court.

It was sought to sustain the Federal proceeding on the grounds that the two actions were different, the one in the state court being a stockholder's bill, while that in the federal court was a creditor's bill.

Conceding that there might be some merit to this contention, it was held that the proceeding in the state court could have been readily converted into a creditor's bill by a simple amendment, and the Chief Justice said (466):

> "But the two proceedings, while not the same, were closely related, and the proceeding in the state court must by the subsequent insolvency have resulted in reframing in the state court the pleadings so as to make it a creditor's bill. Hence they were closely enough related to call upon the Federal court to refuse thereafter to continue jurisdiction through its receiver, and to surrender custody of the *res* to the receivers of the state court. Such action we deem to have been that which the comity and the good faith of a Federal Court owed to the state court."

The attitude of a federal court in a situation of the character under consideration is thus stated (466):

> "Nor should there be any competition or rivalry on the part of the two courts themselves in regard to assuming jurisdiction."

The foregoing excerpts only meagerly indicate the full significance of this case, and its far reaching effect can only be assessed by reading the opinion as a whole.

The duty of a litigant invoking the jurisdiction of a tribunal of concurrent authority to disclose fully and accurately just what has been done in some other

tribunal, is mandatory and fundamental. That Lida and John did not do, and that is abundant reason to restrain them from prosecuting their misleading and deceptive action in the federal court.

Punitive measures against attorneys and individuals in such cases are not sufficient to atone for the transgression of procuring the jurisdiction of a federal court where the result is to deprive a state court of its rights, said Chief Justice Taft in the case cited.

That is equally true here. Nothing, he pointed out, short of a restoration to the state court of its rights met the requirement of simple justice to which it was entitled.

That is the precise situation here. Punitive measures against Lida and John, no matter how severe, do not meet the ends of justice. The rights of the state court must be vindicated and the most effective method to accomplish that salutary result is a decree restraining them from persisting in their contemptuous conduct.

4.

The Duty Of This Court To Enjoin.

The right of the state court to restrain the prosecution of the Bill in the federal court cannot be seriously questioned, and that under circumstances such as here exist it is the duty of the court to exercise its power is manifested by a number of authorities.

The right is distinctly recognized in the Penn Casualty case (294 U. S. 189). In that case a Bill for the appointment of a receiver was first filed in the federal court for the Eastern District of Pennsylvania. While it was pending a Bill was filed by the Secretary of Banking in the Court of Common Pleas of Dauphin

County, Pennsylvania, a receiver appointed, and the defendant commanded to turn its assets over to that receiver and enjoining it from delivering possession to any other, rival receiver.

Thereafter the federal court appointed a receiver and entered a like order and injunction.

On appeal the Supreme Court of Pennsylvania affirmed the decision of the Common Pleas. This court in the case cited reversed, holding that the federal court by the filing of the Bill first acquired jurisdiction, and such jurisdiction being sole and exclusive, the Pennsylvania court was without jurisdiction.

The power of the state court to restrain, had its jurisdiction not been ousted by the prior jurisdiction of the federal court, is thus distinctly recognized.

The duty of the court in the premises is distinctly predicated in

Continental Ill. N. B. & T. Co. v. Chicago, R. I. & P. R., 294 U. S. 648, 79 L. Ed. 1110.

It is there said by Mr. Justice Sutherland (675):

"The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is therefore inherent in a court of bankruptcy as it is in a duly established court of equity."

The opinion continues (675):

"We held (in Kline v. Construction Co., *supra*) that a Federal Court, having first acquired jurisdiction of the subject matter, could enjoin the parties from proceeding in a state court of concurrent jurisdiction 'where the effect of the action would be to defeat or impair the jurisdiction of the Federal Court.'"

In the Kline case it is stated that conversely the state court has like power if it were the first to acquire jurisdiction.

Continuing, Judge Sutherland says (676):

"An injunction may be issued in such circumstances for the purpose of protecting and preserving the jurisdiction of the court 'until the object of the suit is accomplished and complete justice done between the parties.'"

This court in

Looney v. Eastern Texas Railroad Co., 247 U. S. 214,

dealt with a case where certain suits were instituted challenging the validity of orders of the Interstate Commerce Commission.

The Attorney General of Texas, who was a party to the suit in the federal court, later filed a Bill raising the same questions there in litigation in a state court. An application to restrain the prosecution of that case was made to the federal court and an injunction issued.

On appeal, this court affirmed the issuing of the writ and said (221):

"The use of the writ of injunction by Federal Courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice (citing cases) in a rate case. So important is it that unseemly conflict of authority between State and Federal Courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other that Section 265 of the Judicial Code, Revised Statutes, Section 720, Act of March 2, 1793, chap. 22, 1 Stat. at L. 334, Comp. Stat. 1916,

Section 1242, has repeatedly been held not applicable to such an injunction."

If the state court were the first to exercise jurisdiction, the right is complete.

It was so in this case. That court was the first to take jurisdiction. One account had been filed, and there was a decree; the second account was filed before any attempt was made to take jurisdiction in the federal court. The case was pending, with all the parties in interest appearing, long before any question had arisen. The Court of Common Pleas of Fayette County had acquired jurisdiction and it was complete.

5.

The State Court Action Has Not Terminated.

The trust fund having been created by the decree of the state court, that court has sole and exclusive jurisdiction over it and of its administration until final settlement.

As has been stated, at the death of the Princess Lida, the trust terminates and there must needs be a final settlement. The principal fund will then be transferred in kind to the beneficiaries or converted into money and the proceeds distributed, or, it may be that part of it may be set over in kind and the remainder sold.

On November 6, 1933 the state court made an order authorizing the trustees to deposit certain bonds, a part of the trust funds (101-103) under a corporate re-organization plan for conversion into new debentures.

It is indeed difficult to understand how a court which has in the first instance created a trust fund

and controlled its administration, can be ousted of such jurisdiction by a proceeding subsequently instituted in a court of concurrent jurisdiction.

In its opinion the district court sets forth, and Appellants here contend, that the accounts filed in the state court by the Trustees from time to time were purely a voluntary act on their part. This contention is erroneous.

The Trustees were either appointed by the state court or by their co-trustees and their appointments confirmed by the state court. Their accounts in each instance were filed in the court which appointed them or confirmed their appointment and created the fund which they were administering, and which also directed the manner in which they were to administer the fund (100).

The Trustees could not account in any other court. The federal court would be without jurisdiction to entertain an account filed by them because there would be lacking the requisite diversity of citizenship, some of the beneficiaries being citizens of Pennsylvania as are the Trustees. A trustee could not be discharged by any court other than the state court because his appointment was confirmed by that court and his certificate of appointment issued to him.

6.

The State Court Action Is In Rem Or Quasi In Rem.

The language of Mr. Justice Stern in

Thompson v. Fitzgerald, 329 Pa. 497

clearly demonstrates that the action is one *in rem* or *quasi in rem:*

"It is, of course, true that the trust *res* is not in the possession of the Fayette County Court as

would be propegty in a receivership, but it seems reasonably clear that the administration of a trust falls properly within the class of cases governed by the principle giving to the Court first assuming jurisdiction in proceedings *quasi in rem* the exclusive right to determine questions of administration and management, as distinguished from the adjudication of individual rights and interests in the *res*. Not only do the authorities previously quoted specifically include trust administration in their statement of the rule, but, what is of chief importance, the reason underlying the rule applies forcibly to trust estates. In the present case the appointment of all the successive trustees was either made or confirmed by the state court. One of their accounts has been confirmed by that Court, and two others have been filed and are there pending, exceptions having been taken to them. In exercising jurisdiction over a trust estate a Court may frequently be obliged to make orders concerning even the physical custody and safekeeping of specific items of the trust property, or authorizing or directing their sale and the making of reinvestments; one order of the Court below in the present case, under date of November 6, 1933, directed the trustees to deposit certain bonds under a corporate reorganization plan for conversion into new debentures. An accounting by fiduciaries is in itself a proceeding *quasi in rem*, in the sense that it not only adjudicates the legality of the investments constituting the trust, but also, if it results in a surcharge, orders payment and restoration of moneys to the trust fund, that is to the *res*. Such a surcharge is not a judgment to pay money to individuals as in an ordinary personal action. Thus if appellants were successful in the proceedings under their bill in equity no judgment would or could be rendered for payment to them of any money; there could be merely an order for restitution to the trustees themselves as continuing trustees or to their successor trustees; in other words, the recovery would be by the trust fund and not by appellants, who can gain therefrom only upon

distribution of the income and ultimately of the corpus of the trust, as prescribed in the agreement by which it was created.

The line of distinction between proceedings *in personam* and those *in rem* to determine whether or not the jurisdiction acquired by the Court in which they are first instituted is exclusive is not to be drawn with academic nicety. The question is rather one of practical regard for the orderly and efficient administration of justice. If, as here, a Court has made or confirmed the appointment of Trustees, has audited, and continues to be engaged in auditing, their accounts, and, in general, has controlled the management and administration of trust funds for a considerable period of time, and another Court were to attempt to remove such trustees, appoint others, pass upon the propriety of investments already investigated and adjudicated or in process of investigation and adjudication by the first Court, and make orders on the trustees as to the furnishing of surety bonds and similar matters, the management and administration of the trust would be thrown into chaotic condition. As has already been pointed out, practically all the investments specifically attacked in the bill filed by appellants in the Federal Court were contained in the account audited and confirmed by the County Court in 1925 or in the 1930 account now pending audit, or in both. Unless such successive steps in the administration of a trust be regarded as a unit, the result would be, not only that partial accounts could be successively filed and adjudicated in different Courts, but the same account could be audited simultaneously by two Courts, with the obvious possibility of contradictory orders regarding the custody and sale of investments and the liability of the trustees."

7.

Conclusion.

The state court had jurisdiction. The Plaintiffs in the Bill filed in the District Court were two of the

Plaintiffs in the state court proceeding. They invoked the jurisdiction of the state court to settle that controversy. It was still pending when he Bill was filed in the District Court.

Having acquired jurisdiction by an action in which the Plaintiffs in the District Court were two of the Plaintiffs in the original action in the state court, the Court of Common Pleas of Fayette County, Pennsylvania had jurisdiction and it was beyond the power of the original Plaintiffs to change it.

WHEREFORE, Appellees submit that the state court had jurisdiction, that the present proceeding was merely to restrain a rival or conflicting jurisdiction, and that therefore the state court was right in entering the order from which the appeal is taken.

Appellees therefore submit that the state court was right in sustaining its jurisdiction, and that the judgment should be affirmed.

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Counsel for Appellees,
Uniontown, Pennsylvania.

SUPREME COURT OF THE UNITED STATES.

No. 118.—October Term, 1938.

Princess Lida of Thurn and Taxis, formerly Lida Eleanor Purcell Fitzgerald and John Purcell Fitzgerald, Petitioners,
vs.
Andrew A. Thompson, et al., Trustees.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

[January 3, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents the question whether the exercise of jurisdiction by a state court over the administration of a trust deprives a federal court of jurisdiction of a later suit involving the same subject matter.

December 6, 1906, Gerald P. Fitzgerald, a citizen of Ireland, and his wife Lida, entered into an agreement with each other and with Josiah V. Thompson, Charles E. Lenhart, and Fitzgerald, as trustees, which recited the marriage of the two first named, that they had three sons, and that, on December 5, 1906, Lida had obtained a decree of divorce in Ireland. The agreement provided for payments of alimony by Gerald to Lida pending an absolute divorce (which was eventually granted), and for payments thereafter by Gerald to the trustees for the benefit of Lida and the children, to be made out of his share of the profits of two partnerships of which he was a member. From these profits Gerald was to pay the trustees for Lida's benefit an annuity of $15,000 for the first three years and $20,000 thereafter. He was further to pay any difference between the amount of the annuity and one-third of his share of the profits annually until a fund should be established in the hands of the trustees amounting to $300,000, in which Lida, the sons, and Gerald were given interests, either of income or principal or both. In the event of death, resignation, or disability of a trustee, or a successor trustee, the vacancy was to be filled by appointment of the two remaining trustees, or, on their failure to appoint, by the Court of Common Pleas of Fayette County, Pennsylvania, on the petition of a remaining trustee or of Lida.

Lida and the three sons are living. Gerald has assigned his interest in the trust to the Second National Bank of Uniontown, Pennsylvania.

Gerald performed the agreement until June, 1910, when he repudiated it. Thompson, one of the trustees, Lida and her sons, brought suit in equity in the Common Pleas Court of Fayette County, Pennsylvania, seeking performance of the agreement by Gerald and other relief. Gerald answered praying a declaration that the agreement was void. After a hearing the court entered a decree sustaining the agreement; ordering Gerald to account and to pay what might be shown to be due; removing him as a trustee; fixing a lien upon his partnership interests; and restraining him from encumbering or conveying them until the $300,000 fund contemplated by the agreement should be accumulated in the hands of the trustees.

In March, 1915, the trustees then in office petitioned for leave to amend the agreement and for modification of the earlier decree to provide that Gerald should pay and secure to the trustees the payment of sums sufficient to create two funds, one of $400,000 for Lida's benefit and the other of $300,000 principally for the sons' benefit. The court approved the petition and modified its former decree accordingly. May 25, 1925, the trustees then in office acknowledged receipt of all the sums due under the decree of the court as modified and directed that satisfaction of the decree be entered of record. This was done June 3, 1925.

October 9, 1925, the three acting trustees filed an account in the Common Pleas Court, which, in the absence of exceptions, was confirmed. July 7, 1930, a second and partial account was filed in the same court by two surviving trustees on behalf of themselves and a deceased trustee.

On the next day Lida and her son John brought suit in equity in the United States District Court for the Western District of Pennsylvania against the two trustees and the administrators of the deceased trustee, alleging mismanagement of the trust funds and praying that the trustees be removed and all the defendants be made to account and repay the losses of the estate. Thereafter the Court of Common Pleas extended the time for filing exceptions to the second account and, on February 16, 1931, exceptions were filed by Gerald P. Fitzgerald, Jr. Meantime the trustees moved to dismiss the bill in the federal court for lack of indispensable parties and because the state court had exclusive jurisdiction of the controversy. May 12, 1931, the federal court

refused the motion to dismiss and required the defendants to answer, declaring that it would not decide the question of jurisdiction until after answers had been filed. May 18, 1931, the defendants answered setting up that the controversy was within the exclusive jurisdiction of the state court. Nothing further was done in the federal suit until April 17, 1937, when the plaintiffs amended their bill. May 5, 1937, the trustees answered the amendment. Meantime, on May 1, 1937, the trustees had presented a petition in the state court for a rule upon the plaintiffs in the District Court, the petitioners herein, to show cause why they should not be restrained from prosecuting their suit in the federal court. After an answer by Lida denying that the Common Pleas Court had control or possession of the trust funds or that any controversy was therein pending when suit was instituted in the federal court, the rule was made absolute June 17, 1937. July 6, 1937, John Fitzgerald, one of the petitioners, applied to the federal court for an injunction to restrain the defendants in the case there pending, the respondents herein, from further prosecution of the proceedings in the state court. On the same day the petitioners took an appeal from the order of the Common Pleas Court to the Supreme Court of Pennsylvania. July 19, 1937, the trustees filed in the Common Pleas Court a third and partial account of the trust to which exceptions were filed. Testimony was thereafter taken on the exceptions to the second account. September 18, 1937, the federal court temporarily enjoined the defendants in that court, the respondents herein, from further prosecution of the proceedings in the state court to enjoin the plaintiffs, the petitioners herein, from having the jurisdictional issue tried in the District Court, and set November 8, 1937, for a trial of that issue. Trial was accordingly had.

March 21, 1938, the Supreme Court of Pennsylvania affirmed the order of the Common Pleas Court enjoining the petitioners from prosecuting their suit in the District Court,[1] and, on the same day, the District Court rendered an opinion holding it had jurisdiction notwithstanding the proceedings in the Common Pleas Court. The District Judge entered no decree but stated that requests for findings of fact, conclusions of law, and a form of decree, might be submitted, and that he would proceed thereafter to try the merits of the cause.

We are thus confronted with a situation where each of the courts claiming jurisdiction has restrained the parties before it from pro-

[1] Thompson v. Fitzgerald, 329 Pa. 497; 198 Atl. 58.

ceeding in the other. In view of this unusual state of affairs, of the importance of the question involved, and of the claim that the action of the Supreme Court of Pennsylvania is in conflict with our decisions, we granted the writ of certiorari.

First. The suit brought in Common Pleas Court in 1910 was for the specific performance of the agreement of December 6, 1906. The decree in that suit declared the agreement valid and commanded performance in accordance with its terms. As the agreement called for a continuing performance, and the decree was for enforcement of that performance, the court retained jurisdiction to render the granted relief effective. It exercised this retained jurisdiction in 1915 when, by consent of the parties, it modified its decree to comport with amendments of the agreement. But the court's jurisdiction under the bill ceased when Fitzgerald had completely performed in accordance with the amended decree of 1915, as evidenced by the trustees' acknowledgment filed of record in the court on June 3, 1925, that the terms of the decree had been satisfied. The trust was created by agreement inter partes, one of whom repudiated and failed to perform it. When performance had been obtained the equity proceeding was at an end; the trust res in the hands of the trustees, who were the creatures of the agreement, then had the same status as if the court had never been called upon to act.

Second. Although the agreement provided that vacancies occurring by death, resignation, or incapacity of a trustee should be filled by the remaining trustees, and that application to the Court of Common Pleas to appoint a new trustee should only be made in the event the trustees in office could not agree on the appointment of a successor, it appears that from time to time trustees presented their resignations to that court and the court purported to accept them. And when the remaining trustees appointed new trustees to fill vacancies they reported their action to the court which sometimes purported to confirm and ratify that action. The record does not disclose that the first method provided in the agreement for filling vacancies ever was impracticable, or that there was occasion for resort to the court. The petitioners contend that in the circumstances, the court's approval was unnecessary and did not amount to an assumption of jurisdiction. We find it unnecessary to pass upon the contention.

Third. The important questions are whether the filing of the trustees' account on July 7, 1930, gave the Common Pleas Court jurisdiction, and, if so, what was the nature and extent of that

jurisdiction. The Court of Common Pleas is given "the jurisdiction and powers of a court of chancery, so far as relates to: . . . The control, removal and discharge of trustees, and the appointment of trustees, and the settlement of their accounts."[2] Respecting the character of the jurisdiction conferred by a statutory grant so phrased the Supreme Court of Pennsylvania has said: "The scope of supervisory control of necessity includes any matter which concerns the integrity of the trust res—its administration, its preservation and its disposition and any other matter wherein its officers [trustees] are affected in the discharge of their duties."[3] This jurisdiction is vested in the court of common pleas of the county in which "any such trustee shall have resided at the commencement of the trust."[4] Two of the original trustees named in the agreement were residents of Fayette County. Two methods are provided for invoking the jurisdiction with respect to the administration of the trust. The court may cite the trustee on the application of any person in interest "to exhibit an account of the management of the trust estate."[5] The trustee may, on the other hand, obtain an adjudication of his management of the trust by filing his account in the office of the prothonotary of the court and, upon such filing, proceedings are to be had in the same manner as if he had filed the account under compulsion.[6] The trustee is permitted to have an adjudication of his stewardship in this manner every three years.[7]

It thus appears that whether an account be filed pursuant to citation or as the voluntary act of the trustee the jurisdiction of the court attaches and may be exercised over all the matters which fall within its supervisory control of the administration of the estate. The court has the power to fix the compensation of the

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[2] Act of June 16, 1836, P. L. 784, § 13; 17 P. S. § 281.

[3] Wilson v. Board of Directors of City Trusts, 324 Pa. 345, 551.

[4] Act of June 14, 1836, P. L. 628, § 15; 20 P. S. § 2741; § 16, 20 P. S. § 2872; § 23, 20 P. S. § 2767; Act of May 1, 1861, P. L. 680, § 1; 20 P. S. § 2871.

[5] Act of June 14, 1836, P. L. 628, § 19; 20 P. S. § 2833.

[6] Act of June 14, 1836, P. L. 628 § 14; 20 P. S. § 2925.

[7] "All trustees of estates . . . may hereafter, triennially, from the date of their appointment, file their accounts in the appropriate courts, which shall be duly audited, and confirmed absolutely to that date: . . . provided further, That due and actual notice shall have been given, where the account shall be filed by a trustee, to all persons interested in the estate, under the terms and provisions of the trust; . . . and that advertisement shall have been duly made of the filing of said account; and that such persons, actually notified, are legally competent and qualified, either personally or by their guardians, to appear in court and object to said account if they so desire." Act of May 3, 1909, P. L. 391, § 1; 20 P. S. § 2853.

trustee,[8] to require him to take over from the trust investments improperly made and to restore the amount expended for them to the trust estate,[9] to surcharge him with losses incurred, to allow him his proper expenses, to find against him a balance due the estate, and to make the balance found due a lien upon his real estate.[10] In the case of a continuing trust such as that here in question, after adjudication, the corpus is reawarded to the trustee for further administration in accordance with the terms of the trust. In the case of an account filed at the close of administration the court has power to decree distribution to the parties entitled. Under the equity powers conferred upon it the court may enforce its orders against a trustee by attachment for contempt.[11] The jurisdiction extends to a trust like the present created by deed or voluntary agreement.[12] The audit and confirmation of the account is to be had after advertisement and other forms of notice and is binding on all those anywise interested in the estate who have had the required statutory notice of the audit.[13] The parties in interest are permitted by exception and objection to the account to raise all pertinent questions respecting the management of the trust, and to invoke the powers of the court over the subjects above mentioned.[14] The audit will further disclose whether there be probable ground for the removal of the trustee and the appointment of another in his place and if that be done the court has jurisdiction to compel the removed trustee to transfer the trust assets to his successor.

It is obvious that the filing of their account on July 7, 1930, subjected the respondents, as the trustees then in office, to the exercise of the powers thus conferred upon the Court of Common Pleas.

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[8] Act of June 14, 1836, P. L. 628, § 29; 20 P. S. 2271.

[9] See the opinion below, 329 Pa. 512.

[10] Act of April 30, 1855, P. L. 386 § 1; 20 P. S. § 2854.

[11] Chew's Appeal, 44 Pa. 247; Scott v. Jailer, 1 Grant 237; Morrison v. Blake (No. 1) 33 Pa. Super. Ct. 290, 297; Commonwealth v. Heston, 293 Pa. 63, 68.

[12] See Baskin's App., 34 Pa. 272; Jones' Est., 15 Pa. Dist. Rep. 30; In re Weiser Trust, 23 York 80; Ball's Est., 220 Pa. 399.

[13] The petitioners lay stress on an averment in the answer filed in the Common Pleas Court to the trustees' petition for a rule to show cause why the petitioners should not be restrained from prosecuting their suit in the federal court. This is to the effect that the trustees' accounts had been "filed without notice to the" petitioners. No notice of the intention to file is required. Notice is to be given to the parties in interest that the account has been filed and will be audited. There is no averment that the beneficiaries of the trust did not receive such notice.

[14] Compare Moore's App., 10 Pa. 435; McLellan's App. (No. 1), 76 Pa. 231; Comm. v. Trout, 76 Pa. 379.

We turn to the suit instituted in the District Court to ascertain what relief was there sought. In the bill as originally filed sundry investments made by the trustees were attacked and they were charged with mismanagement of the estate. The prayers were that they be cited to file an account of the trust; that they be removed; that all trustees under the agreement be required to give bond for the faithful performance of their duties; and for general relief. By the amended bill additional trust investments were attacked. New prayers were substituted asking that the defendants be required to answer, to restore to the trust funds the moneys lost by their illegal and negligent conduct; that they be removed; that all trustees be required to give bond; and for general relief.

The plaintiffs in the District Court were but two of the five cestuis. One of the others has appeared in the Common Pleas proceeding and excepted to the trustees' accounts. Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.[15] On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other.[16] We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.[17] The doctrine is necessary to the harmonious cooperation of federal

[15] Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 195, and cited cases.

[16] *Ibid.*

[17] Farmers' Loan & T. Co. v. Lake Street E. R. R. Co., 177 U. S. 51, 61; Palmer v. Texas, 212 U. S. 118, 129; United States v. Bank of New York &c. Co., 296 U. S. 463, 477.

and state tribunals.[18] While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his right or his interest as a basis of a claim against a fund in the possession of a state court,[19] this is not such a case. No question is presented in the federal court as to the right of any person to participate in the fund or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus.

Petitioners insist that *Shelby* v. *Bacon*, 10 How. 56, is conclusive that, under the law of Pennsylvania, the filing of an account on July 7, 1930, did not constitute the institution of a suit by the trustees, did not confer exclusive jurisdiction on the state court and did not bar the subsequent institution of a suit in the federal court for the same relief. In this we think they are in error. What was there said by this court to the effect that the filing of an account in the state court did not constitute a suit and did not confer jurisdiction on the state court, was not necessary to the decision and is not in accord with the law of Pennsylvania as declared by its own Supreme Court.[20] Assuming, however, that the state court had jurisdiction, this court held merely that the plaintiff had a right to establish his claim by suit in the Circuit Court notwithstanding the State court's jurisdiction over the trust. The court was careful to say that it was unnecessary to consider questions which might arise in the exercise of the jurisdiction of the federal court. The decision is in entire accord with many cases which hold that an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res.

The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held, quasi in rem, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from further proceeding in that court.

The judgment is affirmed.

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[18] United States v. Bank of New York & Trust Co., *supra*, 478, and cases cited.

[19] Commonwealth Trust Co. v. Bradford, 297 U. S. 613, 619, and cases cited.

[20] Whitney's Appeal, 22 Pa. 500, 505.